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Chairman: Mr. Gómez Robledo .... (Mexico)

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The meeting was called to order at 4.20 p.m.

Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*) (A/61/10)

1. **Mr. Pambou-Tchivounda** (Chairman of the International Law Commission), introducing chapters VI and VII of the Commission's report, said that, in 2006, the Commission had decided to re-establish the Working Group on Shared Natural Resources to continue the consideration of the draft articles submitted by the Special Rapporteur in his third report (A/CN.4/551 and Corr.1). The Working Group had completed its work by submitting a set of draft articles, which the Commission had referred to the Drafting Committee before adopting, on first reading, a set of 19 draft articles on the law of transboundary aquifers. Though the text currently took the form of draft articles, the Commission had yet to take a decision as to its final form.

2. The scope of the draft articles was broader than that of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, on which the draft articles were modelled, since draft article 1 included activities that were likely to have an impact on an aquifer or aquifer system. That extended coverage served as recognition of the particular vulnerability of groundwater resources to pollution and other external activities. Draft article 2 contained definitions of terms used in the draft articles. The formulation of draft article 3 captured the main thrust of General Assembly resolution 1803 (XVII), entitled "Permanent sovereignty over natural resources", while recognizing that the exercise of sovereignty by States operated against the background of general international law.

3. Draft article 4 set out the general principle of equitable and reasonable utilization in an attenuated form that sought to maximize the long-term benefits of the aquifer concerned. The principle of equitable and reasonable utilization applied to all aquifers. However, some objectives might differ, as set out in paragraph (d), depending on whether the aquifer concerned was recharging or non-recharging. Draft article 5 provided a non-exhaustive list of factors relevant to equitable and reasonable utilization. In weighing the different utilizations, special regard must be given to vital human needs.

4. The obligation not to cause harm was reflected in draft article 6. Although some criticism had been voiced regarding the use of the threshold of "significant" harm, the Commission had considered that it was important to retain the threshold. The term "significant" would have to be interpreted relatively, bearing in mind the special characteristics of transboundary aquifers. Under the draft articles, aquifer States also had obligations to cooperate among themselves and to exchange data and information relating to transboundary aquifers or aquifer systems. Those obligations were found in draft articles 7 and 8 respectively.

5. Draft articles 9 and 10 related, respectively, to the protection of ecosystems within, or dependent upon, transboundary aquifers or aquifer systems and to the protection of recharge and discharge zones. According to groundwater experts, the protection of such areas was critical for the viability of the aquifer, even when they were outside the territory in which the aquifer or aquifer system was located. Draft article 11 required States to take a precautionary approach by preventing, reducing and controlling the pollution of their transboundary aquifer or aquifer system. Draft articles 12 and 13 encouraged aquifer States to carry out monitoring and management activities jointly, while recognizing that, in practice, such close collaboration might not always be possible.

6. Draft article 14, on planned activities, differed substantially from the corresponding provisions of the 1997 Convention. It contained general minimum requirements for assessing the impact of planned activities, providing notice of such activities and dealing with potentially affected States, but it largely left the details of implementation to the States concerned. The draft article applied not only to aquifer States but also to any State that had reasonable grounds for believing that a planned activity in its territory would affect a transboundary aquifer or aquifer system.

7. Draft article 15 provided for scientific and technical cooperation with developing States. Draft article 16 allowed States to derogate from certain general principles applicable to the utilization of groundwater resources in order to alleviate the impact of an emergency situation on affected individuals. Draft articles 17 and 18 were substantially similar to the corresponding provisions of the 1997 Convention. However, there had been some discussion in the Commission as to whether it was necessary or useful to include those provisions. The Commission would

therefore welcome specific comments on them. Draft article 19 encouraged States to enter into bilateral and regional agreements or arrangements, while bearing in mind the interests of other States whose rights might be affected. The Commission had not included provisions on settlement of disputes or on the relationship between the draft articles and pre-existing or future binding instruments, including the 1997 Convention. Those issues would have to be addressed if a binding instrument was the preferred final form of the draft articles.

8. Since the Commission had begun work on the topic of shared natural resources, awareness of the importance of transboundary groundwater resources had increased. States were cooperating on the utilization, protection and management of aquifers and substantial State practice was emerging. The draft articles could make an important contribution in that regard. The Commission would welcome the views of Governments on the substance of the draft articles adopted on first reading, the commentaries thereto and the final form that the draft articles should take.

9. With regard to the topic "Responsibility of international organizations", he said that the Commission had considered the Special Rapporteur's fourth report (A/CN.4/564 and Add.1 and 2), which dealt with circumstances precluding wrongfulness and with the responsibility of a State in connection with the wrongful act of an international organization. The Commission had adopted 14 draft articles, which were reproduced, with commentaries, in chapter VII of the Commission's report.

10. Draft articles 17 to 24 were modelled on the articles on responsibility of States for internationally wrongful acts, with certain adjustments. Although practice with regard to the invocation of circumstances precluding the wrongfulness of an act of an international organization was limited, and it was unlikely that some of those circumstances would arise with respect to an international organization, there was no reason to consider that circumstances applicable to a State could not be applied to an international organization. Draft articles 17, 20, 21, 23 and 24 reproduced mutatis mutandis the corresponding articles on State responsibility.

11. Draft article 18 corresponded to article 21 on State responsibility and recognized the lawfulness of measures of self-defence taken in conformity with international law, although the circumstances in question were relevant for only a limited number of international organizations. The reference to the Charter of the United Nations contained in article 21 on State responsibility had been replaced by a reference to "the principles of international law embodied in the Charter of the United Nations", since international organizations were not members of the United Nations.

12. In the practice relating to United Nations forces, the concept of "self-defence" had sometimes been understood in a wider sense to cover situations beyond those in which a State or an international organization was the subject of an attack by a State. The extent to which United Nations troops were entitled to use force depended on the primary rules concerning the scope of the mission and did not need to be discussed in the present debate. The same applied to the conditions under which an international organization might resort to force in response to an attack by a State and to collective self-defence on behalf of one of its member States.

13. The elaboration of draft article 19, on countermeasures, had been deferred to a later stage, when the issues relating to countermeasures by an international organization would be examined in the context of the implementation of the responsibility of an international organization.

14. Turning to draft article 22, he said that practice with regard to the invocation of necessity by international organizations was scarce. The draft article reflected a compromise between two opposing positions that had been expressed in the Committee and in the Commission: the view that international organizations should be able to invoke necessity on the same level as States and the view that the invocation of necessity by international organizations should be ruled out. The compromise, set out in paragraph 1 (a), consisted in allowing the invocation of necessity by an international organization only for the purpose of safeguarding an essential interest of the international community against a grave and imminent peril when the organization had, in accordance with international law, the function to protect that interest. Nonetheless, some members of the Commission considered that an international organization should be able to invoke necessity in order to safeguard an essential interest of one of its member States. Paragraph 1 (b) provided that the act in question should not seriously impair an essential

interest of the State or States towards which the obligation existed or of the international community as a whole. Draft article 22, paragraph 2, corresponded to article 25, paragraph 2, on State responsibility.

15. Draft articles 25 to 30, on the responsibility of a State in connection with the act of an international organization, were contained in the current chapter (x), whose position in the overall text of the draft articles would be determined at a later stage. Draft articles 25 to 30 could constitute a new part of the draft articles or the final chapter of Part One.

16. Draft articles 25 to 30 were intended to fill a gap that had been left deliberately in the articles on State responsibility, which, as stated in article 57 on State responsibility, were without prejudice to any question of the responsibility of any State for the conduct of an international organization. However, not all the questions that might affect the responsibility of a State in connection with the act of an international organization were examined in the draft articles on responsibility of international organizations. In particular, if an issue arose as to whether certain conduct was to be attributed to a State or to an international organization or both, the draft articles provided criteria for attributing conduct to an international organization, whereas the criteria for attributing conduct to a State were set out in the articles on State responsibility. Draft articles 25 to 30 were based on the assumption that there existed conduct attributable to an international organization.

17. Draft articles 25, 26 and 27 dealt, respectively, with aid or assistance by a State, direction and control exercised by a State or coercion by a State resulting in an internationally wrongful act by an international organization. The provisions covered situations similar to those governed by draft articles 12, 13 and 14, in which the source of such assistance, control or coercion was another international organization. Mutatis mutandis, the wording used was the same as that of draft articles 16, 17 and 18 on responsibility of States for internationally wrongful acts, since it would be hard to find reasons for applying a different rule when the entity concerned was an international organization rather than a State. The State assisting, directing, controlling or coercing an international organization might or might not be a member of that organization. If it were, such assistance, control or coercion could not simply consist in participation in the decision-making process of the organization according to the rules of the organization. It was, however, conceivable that such assistance, control or coercion could result from conduct by the State within the framework of the organization. The factual context, such as the size of membership and the nature of the involvement, would probably be decisive in borderline cases. Aid or assistance by a State could constitute a breach of an obligation that the State had acquired under a primary norm. In that case, international responsibility would have to be determined in accordance with the articles on responsibility of States for internationally wrongful acts.

18. Draft article 28, which had no equivalent in the articles on responsibility of States for internationally wrongful acts, concerned a situation in which a State, availing itself of the separate legal personality of an international organization of which it was a member, circumvented an international obligation by providing the organization with competence in relation to that obligation. According to the draft article, two elements were required for international responsibility to arise. The first was that the State should provide the organization with competence in relation to the obligation concerned, either through the transfer of State functions to an organization of integration or in order to exercise functions that member States might not have themselves. The second condition was that the international organization had committed an act that, if committed by the State, would have constituted a breach of an international responsibility. It was not necessary for the act to have been caused by the member State, but, if such was the case, the State would incur responsibility not only under draft article 28 but also under draft articles 25, 26 or 27. As indicated in draft article 28, paragraph 2, paragraph 1 applied whether or not the act was internationally wrongful for the organization concerned. The draft article did not require any specific intention on the part of the member State to circumvent an obligation, nor did it cover only cases in which the State had committed an abuse of law. The word "circumvent" was used, however, to exclude the responsibility of a member State when the act committed by the organization was an unintended consequence of the attribution of competence to it by the State.

19. Draft article 29, which also had no equivalent in the articles on responsibility of States for internationally wrongful acts, dealt with two other cases in which a member State was responsible for the internationally

wrongful act of an organization. The first was when a State accepted responsibility for the act in question, either explicitly or implicitly and whether before or after the time that responsibility arose for the organization. The acceptance, which could also result from the constituent instrument or the rules of the organization, must, however, produce legal effects in relation to the injured third party and not only in relation to the organization.

20. A member State was also responsible if it had led the injured party to rely on its responsibility. The term "injured party" covered any State, international organization, person or entity with regard to which a member State might incur international responsibility. There was no presumption that an injured party could rely on the responsibility of States members of an organization. In the cases covered by paragraph 1, subparagraphs (a) and (b), a member State incurred responsibility only if it had accepted responsibility or if its conduct had given the third party reason to rely on that responsibility. Nor was its status as a member sufficient to make a State responsible for the internationally wrongful act of an organization. Draft article 29, paragraph 2, dealt with the nature of the responsibility that was entailed in accordance with paragraph 1. In view of the limited number of cases in which responsibility arose under paragraph 1, the Commission had considered it reasonable to adopt only a rebuttable presumption of subsidiary responsibility.

21. Draft article 30, which was similar to draft article 16, constituted a saving clause concerning the responsibility of the international organization that had committed the act in question or of any other international organization. The provision corresponded to article 19 on responsibility of States for internationally wrongful acts.

22. Draft articles 25 to 30 did not address the question of the responsibility of entities other than States that were also members of an international organization. The case of an international organization that assisted, controlled or exerted coercion over another international organization of which it was a member had already been covered by chapter IV of Part One of the draft articles. Additional provisions would, however, have to be introduced in chapter IV in order to deal with situations, similar to those covered by draft articles 28 and 29, that concerned international organizations as members of other organizations. The responsibility of entities other than States or international organizations was beyond the scope of the draft articles.

23. The Commission would be glad to receive comments from Governments and international organizations, especially on draft articles 28 and 29. It would also like to hear their views on the following questions: whether States that were not responsible for the internationally wrongful act of an international organization of which they were members had an obligation to compensate an injured third party, should the organization not be in a position to do so; and, where an organization committed a serious breach of a peremptory norm of general international law, whether States and other international organizations were obliged to cooperate to bring such a breach to an end.

24. **Ms. Lehto** (Finland), speaking on behalf of the European Union; the acceding countries Bulgaria and Romania; the candidate countries the former Yugoslav Republic of Macedonia and Turkey; the stabilization and association process countries Albania, Bosnia and Herzegovina and Serbia; and, in addition, Moldova and Ukraine, expressed some concern as to the feasibility of subsuming all international organizations under the terms of the draft articles, given the highly diverse nature of international organizations. The European Union and the European Community were, after all, rather specific in nature. The latter, in particular, was characterized by the direct applicability of Community law in its member States and the supremacy of its law over national law.

25. Draft articles 17 to 24 followed very closely the model of the relevant articles on responsibility of States for internationally wrongful acts. That approach, however, might not always be appropriate. Since, for example, the European Union carried out a wide variety of civil crisis management missions, for which the Presidency of the Union and the Commission were jointly responsible and which required the explicit consent of the country concerned, draft article 17 was of vital importance for a whole range of external relations activities of the Union, which could otherwise be seen as undue interference in the domestic affairs of a given country.

26. With regard to draft article 22 ("Necessity"), she noted that, even if a majority of the statements in the Sixth Committee had been in favour of including such an article among the circumstances precluding wrongfulness, some European Union member States

had expressed doubts, in view of the lack of relevant practice, the risk of abuse or the need to provide stricter conditions than those applying to States. The new draft text tried to take those points into consideration with its inclusion, in paragraph 1 (a), of the phrase "when the organization has, in accordance with international law, the function to protect that interest". The phrase, which was stricter than the condition applying to States under article 25 of the articles on responsibility of States for internationally wrongful acts, might well serve as a safeguard against abuse. The new formulation sought to create a nexus between necessity and an organization's tasks and powers, which were usually defined in the organization's founding treaty, but difficulty might arise over its implied powers. The draft article was very carefully worded, but it remained to be seen whether it could muster the necessary support.

27. The draft articles posed some challenging questions. Broadly speaking, the European Union could go along with draft articles 17 to 24, but it had serious concerns with regard to some details of draft articles 28 and 29. It was to be hoped that the Commission would take good note of those concerns. More detailed comments on the draft articles would be made at a later stage on behalf of the European Community by the representative of the European Commission.

28. **Mr. Lehmann** (Denmark), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the assembled examples of the practice of international organizations and the case law on responsibility provided a useful guide to a complex subject by setting a practical framework for the work of the International Law Commission. The Nordic countries hoped that States and organizations would contribute further examples of such practice and case law.

29. The Nordic countries supported the continued reliance on and reflection of the provisions on responsibility of States for internationally wrongful acts in the elaboration of the draft articles on responsibility of international organizations. Some modifications would, however, need to be made in order to reflect the particular role and functions of organizations in international cooperation.

30. The Nordic countries were broadly in agreement with the text of draft articles 17 to 30. In draft article 22 ("Necessity"), which was the result of a compromise between various views expressed in the Commission and in the Committee, the right balance seemed to have been struck. Further thought should, however, be given to the question whether it was helpful to restrict the availability of "necessity" to situations concerning the essential interests of the international community as a whole. So long as the organization had the "function to protect that interest", in accordance with paragraph 1 (a), it would seem that the essential interests of member States, or indeed the organization itself, could also be the basis for an international organization's invocation of necessity.

31. While draft articles 25 and 26 echoed well-established principles of State responsibility, the current formulation of draft article 28 ("International responsibility in case of provision of competence to an international organization") opened up a wide and unwarranted field of international responsibility for States for which there was no basis in international law. The vague criterion of "circumvention" and the meaning attributed to the term in the commentary set the threshold for State responsibility very low. Even though a State would not be responsible under draft article 28 if it was unaware of the breach of obligation by the international organization, the meaning given to the term "circumvention" and the formulation of the rest of the provision were both broad and unclear. Since the provision could be construed as constituting the progressive development of international law rather than codification, the Commission should give it further consideration. Thus, for example, one indication of whether an obligation had been circumvented by the transfer of competence to an international organization could be the rules and regulations of the organization itself and the degree to which they provided protection for the obligations of the State. If such protection was generally in place, it would seem wrong to hold a State that had transferred competence to an organization in good faith responsible for acts by the organization that violated such an obligation. A clearer distinction should be drawn between transfers of competence in good faith and those made with the intention to evade responsibility. Only the latter situation should give rise to responsibility. States should not be permitted to delegate their responsibilities to an international organization in order to avoid them. Consideration should therefore be given to providing exceptions for organizational responsibility.

32. Turning to the specific questions posed to member States, he said that, on a preliminary basis, the reaction of the Nordic countries to the question whether members of international organizations that were not responsible for an internationally wrongful act had an obligation to provide compensation to the injured party was that no general principle of international law was involved, as reflected in the commentary to draft article 29, which referred to such cases as the litigation concerning the International Tin Council. It would therefore seem all the more questionable to establish a general obligation to compensate in cases where the State was not responsible for the internationally wrongful act. Where the organization was not in a position to provide compensation, the obligation of member States to contribute to compensation would probably be governed by the organization's constituent document, including the specific financial obligations that member States had assumed.

33. With regard to the second question, which asked whether States and other international organizations were under an obligation to cooperate to bring to an end a serious breach of an obligation under a peremptory norm of international law, the most appropriate approach would be to echo article 41, paragraph 1, of the articles on responsibility of States for internationally wrongful acts, which did impose such an obligation. The rationale for the existence of such a principle in inter-State relations was all the more compelling in relations between States and international organizations, particularly where the State in question was a member of the organization. The commentary to article 41, paragraph 1, of the articles on responsibility of States for internationally wrongful acts could be helpful in suggesting the precise content of such an obligation.

34. **Mr. Trauttsmansdorff** (Austria), referring to chapter V of the draft articles on responsibility of international organizations, said that several articles on State responsibility applied without substantial changes to organizations that met the definition of draft article 2. That seemed to be the case in regard to draft articles 20, 21, 23 and 24. The other draft articles of chapter V, required another approach, however, given the variety of existing international organizations and their diverse legal situations in relation to their member States and third States.

35. In the other new chapter of the draft articles, the Special Rapporteur had sensibly seen fit to confront the complex relationship between responsibility for wrongful acts incurred by a State, on the one hand, and by international organizations, on the other. The complex nature of the relationship between States and international organizations had become fully apparent when the Commission had attempted to apply the content of the provisions contained in chapter IV of Part One of the articles on State responsibility to the relationship between international organizations and States. The same applied to draft articles 28 and 29, contained in the same new chapter.

36. At the previous session, his delegation had raised the question of the relationship between States as genuine and full subjects of international law and international organizations as derivative subjects of international law. Questions of responsibility (and also liability) were closely linked to the specific *inter-se* relations between organizations and their member States. Disregarding or levelling those specific relations carried the risk of leaving conceptual gaps. Furthermore, a clear distinction had to be made between the legal positions of member States, third States that had recognized the international organization and third States that had explicitly refused to do so. The question had to be asked whether more clarity on the character of the different international organizations was required if the Commission continued to apply the method used so far.

37. It might be timely, at the beginning of a new quinquennium, to think about a review of the general approach adopted so far in dealing with the draft articles on the responsibility of international organizations. Basically, the system of trying to translate the principles contained in the articles on State responsibility to international organizations as defined in draft article 2 continued to appear appropriate. An attempt might be made to provide a more in-depth analysis of the organizations covered by the definition of draft article 2. Such an analysis might lead to a typology of international organizations, which would facilitate reference to the international organizations dealt with in the draft articles. The analysis should inter alia cover such elements as the function of international organizations, their legal and political nature, their recognition by third States or the community of States as a legal entity, the degree of independence of their actions from control by the

member States, their powers vis-à-vis the member States, and the status of member States within the organization. Given the difficulties inherent in the draft articles already submitted, his delegation believed that a basic analysis on those lines would facilitate the future work of both the Commission and the Sixth Committee. It would be well to keep in mind that the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations had still not entered into force 20 years after its adoption. One of the main reasons for that situation was the lack of clarity on the scope of international organizations covered by that Convention.

38. Turning to specific draft articles, he said that in draft article 18, on self-defence, there appeared to be a lack of clarity regarding the legal basis for the right to self-defence by an international organization unless it derived from the inherent right to self-defence of States under Article 51 of the Charter of the United Nations. The reference to the "principles of international law embodied in the Charter" might lead to misunderstandings. As to draft article 22, on necessity, his delegation agreed that the principle of necessity should not be invocable by international organizations as widely as by States. In principle, his delegation found some value in the language finally adopted by the Commission: "essential interest of the international community as a whole". His delegation understood that the reference was designed to raise the threshold for excluding the wrongfulness of an act by an international organization. But the notion of such essential interest without further qualification lacked the necessary clarity. The problem could, however, be diminished, if the principle of necessity was tied to the mandate of the organization.

39. Draft article 25, on aid or assistance, suffered from a shortcoming with regard to States providing national contingents under the operational control and command of an international organization. As currently conceived, draft article 25 might endanger international military missions because it would provide sending States with reason and justification to interfere with the command structures of the international organization, a matter which was a legitimate concern of the United Nations. The term "aid and assistance" would therefore require a more in-depth definition of the relationship between a State and an international organization.

40. The whole concept of draft article 26 on direction and control exercised by a State over the commission of an internationally wrongful act by an international organization needed further clarification. With regard to draft article 27, on coercion, the specific nature of international organizations should be taken into account before merely applying the law of State responsibility. In nearly every field of activity, international organizations were highly dependent on the willingness of their member States to cooperate. In principle, draft article 28, on international responsibility in case of provision of competence to an international organization, reflected the jurisprudence of the European Court of Human Rights, although the draft did not take the Bosphorus decision into account. However, since the Bosphorus reasoning was very much designed to ease relations between the European Court of Justice and the European Court of Human Rights, it seemed doubtful whether that approach should become a general rule. With regard to draft article 29, on responsibility of a State member of an international organization for the internationally wrongful act of that organization, the Commission should reconsider the terminology, especially the relation between "responsibility" and "liability". Most of the draft articles he had mentioned seemed to require reconsideration by the Commission. In particular, he hoped that the Commission would make good use of the start of the new quinquennium by working on an in-depth analysis of the different types of organizations covered by the definition in draft article 2, as he had earlier suggested.

41. Turning to the topic of shared natural resources, he said that his delegation welcomed the completion of the first reading of the draft articles on the law of transboundary aquifers. Bearing in mind that international practice and scientific knowledge concerning transboundary aquifers had been growing steadily in recent years, the Commission should consider other means than a convention. "Guidelines" or "principles" could be an appropriate way of consolidating the law of transboundary aquifers. The scope of the draft articles seemed to include only freshwater resources, and it should perhaps be clearly stated that saltwater resources were excluded. Furthermore, with regard to the commentary to draft article 1 and the potential questions to be raised therein concerning the relationship between the current draft articles and the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses,

his delegation held the view that that matter should receive careful consideration when the decision on the final form of the draft articles was taken.

42. **Mr. McDonald** (Ireland), referring to chapter VII of the Commission's report, said that Ireland welcomed draft articles 17 to 24, on circumstances precluding wrongfulness. His delegation also supported the inclusion of a draft article on necessity, while remaining conscious of the need to limit the scope of the exception within defined boundaries. In its current form, draft article 22 failed to adequately protect member States' essential interests. A State might choose to entrust certain functions to an international organization; however, the fact that a State had transferred functions did not mean that it no longer retained essential interests in relation to those functions. Those essential interests of the State might be imperilled by an act of omission of the organization, even if the organization's conduct was consistent with, and indeed required by, its own legal obligations. However, according to the wording of the most recent draft of article 22 adopted by the Commission, unless a member State's essential interest coincided with an essential interest of the international community as a whole, the international organization was unable to invoke necessity. Obviously, States might be reluctant to transfer powers to an international organization if their essential interests were not afforded sufficient protection. His delegation therefore supported the view held by some members of the Commission that an international organization should be entitled to invoke an essential interest of its member States when claiming necessity.

43. His delegation was also concerned that draft article 22 might not reflect the present reality of movement towards international integration. The draft article made an organization's ability to invoke necessity dependent on its functions. While in the modern era, international integration had led to States granting international organizations more and more functions, most of those organizations dealt individually with discrete issues and were entrusted with a narrow range of functions. Draft article 22, in its present form, might fail to adequately accommodate that state of affairs. After all, it was quite plausible that the actions of an international organization might imperil an essential interest of a member State, or indeed of the international community as a whole, without that organization having as one of its functions the protection of that interest. In such circumstances, the current wording of draft article 22 would leave the organization without recourse to the claim of necessity in order to safeguard the imperilled essential interest.

44. His delegation welcomed the observation of the Special Rapporteur that in determining the essential interests which an international organization had the function to protect, reference only to the constituent instrument might be too restrictive. Conversely, not all the functions which an organization was vested with in its constituent instrument were to be regarded as essential interests. For all the reasons he had mentioned, he urged the Commission to review the formulation of draft article 22.

45. Turning to draft article 28, on international responsibility in case of provision of competence to an international organization, he said that his delegation supported the efforts of the Special Rapporteur to make provision for member States to incur responsibility for acts of international organizations in certain circumstances. His delegation had reservations, however, as to the wording of draft article 28. The scope of the draft article in its present form was inadequately defined. The insistence on the provision of competence in relation to the circumvented obligation might unduly narrow the scope of the article where a restrictive understanding of that requirement was employed. In such circumstances, the member State might not have provided the organization with competence in relation to the specific obligation being circumvented but might nevertheless, in the knowledge that the organization had a general competence that could impinge on the obligation, have intended that it should be breached by the organization.

46. Conversely, a broad understanding of the provision of competence requirement could result in State responsibility where an international organization acted on the basis of a general competence which might affect the obligation in question but without any intent on the part of the member State that the obligation should be breached. In that regard, his delegation welcomed the Commission's commentary to draft article 28, which provided that the use of the term "circumvention" was intended to exclude that international responsibility arose when the act of the organization, which would constitute a breach of an international obligation if taken by the State, had to be regarded as an unwitting result of providing the international organization with competence. On a

practical level, the determination of whether or not a State had provided an organization with competence in relation to an obligation could prove problematic. His delegation's primary concern, however, was the absence of any requirement of intent in draft article 28 which would limit the potential scope of the draft article.

47. **Mr. Marsico** (Argentina), referring to chapter VI of the report, on shared natural resources, said that his delegation agreed with the Commission's approach in formulating the general rules applicable to the law of transboundary aquifers. The final format of the draft articles could be that of a framework convention which would serve as a basis for subsequent agreements or other detailed arrangements. His delegation particularly agreed with the definitions of aquifer and aquifer system in draft article 2. It reiterated its support for the inclusion in draft article 3 of an express affirmation of the principle of sovereignty of the State over the portion of a transboundary aquifer or aquifer system located within its territory. Aquifers and their resources belonged to the States where they were located, notwithstanding obligations to cooperate in their rational use and preservation. That provision also was significant because it clearly placed the primary responsibility for the use and management of each transboundary aquifer in the State where the aquifer was located. His delegation gave its full approval to the criteria behind the development of the principles and rules proposed in draft articles 4 to 19.

48. Turning to chapter VII, on responsibility of international organizations, he said that his delegation supported the text of draft articles 17, 18 and 20 to 24, concerning circumstances precluding wrongfulness. In draft articles 25 to 29, it was important to bear in mind that the attribution of responsibility to a member State was possible only as an exception to the rule that an organization had a legal personality that was different and separate from those of its members. Therefore, the conditions and scope of any concurrent or subsidiary responsibility of the member State would depend on the specific characteristics of the organization, its constituent instrument, its established practice and other modalities of what draft article 4, paragraph 4, defined as "rules of the organization". His delegation had no comment on the proposed norms in draft articles 25 to 27 and agreed with the approach taken in draft articles 28 and 29.

49. With reference to paragraph 28 of the report, he said that his delegation considered that the question of whether the members of an international organization that were not responsible for its wrongful act must compensate the injured party when the organization was insolvent must be approached taking into account the basic distinction between the legal personality of the organization, which in principle should be solely responsible, and the individual and separate status of the member States. The Special Rapporteur might analyse whether the special characteristics and rules of each organization, as well as considerations of justice and equity, called for exceptions to the basic rule, depending on the circumstances of each case.

50. Regarding the second question, his delegation believed that article 41, paragraph 1, of the articles on responsibility of States for internationally wrongful acts was, mutatis mutandis, applicable to the case of a serious breach of an obligation under a peremptory norm of international law by an international organization. For the reasons that had inspired that rule, States and other international organizations must cooperate to put an end to the breach in a joint and coordinated manner by such lawful means as were called for under the circumstances, regardless of whether they had been directly injured by the breach or not.

The meeting rose at 6 p.m.

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General Assembly
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Chairman: Mr. Barriga (Vice-Chairman) .... (Liechtenstein)

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In the absence of Mr. Gómez Robledo (Mexico), Mr. Barriga (Liechtenstein), Vice-Chairman, took the Chair.

The meeting was called to order at 10.05 a.m.

Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*) (A/61/10)

1. **Mr. Witschel** (Germany) said that the provisionally adopted draft articles on responsibility of international organizations, which were based where possible on the articles on responsibility of States for internationally wrongful acts, had thus far succeeded in balancing the similarities and differences between those two aspects of responsibility under international law.

2. In the debate in the Sixth Committee during the sixtieth session of the General Assembly, his and other delegations had expressed doubts as to whether international organizations, by analogy with States, could invoke necessity, while some other delegations had supported the principle. His delegation could accept the compromise reflected in the current wording of draft article 22, under chapter V on circumstances precluding wrongfulness, since it strictly limited the circumstances under which international organizations could invoke necessity, taking into account their special character.

3. Draft articles 28 and 29, however, were without precedent, and a thorough discussion, as the Commission had requested, was vital. His delegation supported the general concept behind draft article 28, on international responsibility in case of provision of competence to an international organization — States should not be allowed to evade their international obligations by transferring competence to an international organization — but the concept needed more clarification than the current draft article provided. Some issues concerning the conditions of "circumvention" required further discussion, and the introduction of the element of "misuse" should be considered. Some helpful ideas could be drawn from the case law of the European Court of Human Rights.

4. In draft article 29, on responsibility of a State member of an international organization for the internationally wrongful act of that organization, paragraph 2, which enunciated the subsidiary character of such responsibility, appeared to reflect the relevant law. However, the conceptual and material approach of the draft article left a number of questions open. On the whole, his delegation agreed with the approach of avoiding a residual, negative rule indicating the cases in which responsibility did not arise for a State in connection with the act of an international organization and instead identifying positively those cases in which a State did incur responsibility. Systematic interpretation — and the current debates in the Sixth Committee would become part of the *travaux préparatoires* and hence supplementary means of interpretation — would then elucidate the negative cases. It was of the utmost importance to Germany, for example, that the mere fact of membership should not be held to entail the responsibility of a member State for the act of an international organization.

5. **Mr. Ma** Xinmin (China) said that the draft articles on the law of transboundary aquifers adopted by the Commission on first reading represented an enrichment and further development of international law on water resources. His delegation held the view that international cooperation on transboundary aquifers should be based on respect for the permanent sovereignty of aquifer States over water resources within their territories; reasonable exploration and utilization of such water resources should in no way be restricted. The outcome of the work on the topic could take the form of general guiding principles, since conditions were not ripe for the formulation of an international treaty. The Commission should approach the question of whether to consider other transboundary resources with prudence after broadly canvassing the views of States.

6. With respect to drafting details, draft article 1, subparagraph (b), extended the scope of application to "other activities that have or are likely to have an impact upon those aquifers and aquifer systems". His delegation felt that the wording was too broad; the relevant activities should be limited to those likely to have "a major impact". With regard to draft article 7, paragraph 2, which provided that aquifer States should establish joint mechanisms of cooperation, China was in favour of strengthening cooperation through such mechanisms, but thought that it was not appropriate to make it compulsory; the will of States should be respected and the general obligation to cooperate was not yet established in international law. His delegation therefore proposed the following wording for draft article 7, paragraph 2: "... aquifer States should give

positive consideration to establishing joint mechanisms of cooperation". With regard to draft article 8, on regular exchange of data and information, in some countries the availability and exchange of hydrological and related data and information might be subject to legal regulation; therefore a qualification should be added to the effect that the exchange of data and information on transboundary aquifers, as provided for in the article, would be carried out to the extent permitted by law. As to draft article 15, China fully supported the promotion of scientific, educational, technical and other cooperation with developing States for the protection and management of transboundary aquifers or aquifer systems, but it should be borne in mind that cooperation with regard to aquifers was an interactive process. Where the capacity of developing States to manage their aquifers was weak, technical and financial assistance from developed States would be required. His delegation therefore suggested the addition of another subparagraph reading: "mobilizing financial resources and establishing appropriate mechanisms in order to help them carry out relevant projects and facilitate their capacity-building".

7. With regard to the draft articles on responsibility of international organizations provisionally adopted by the Commission, since the articles on responsibility of States for internationally wrongful acts did not address the responsibility of a State in connection with the wrongful act of an international organization, his delegation supported the Commission's efforts to fill that gap.

8. In draft article 22 the Commission had retained "necessity" as one of the circumstances precluding wrongfulness. Even though it had set out strict conditions limiting the invocation of necessity, his delegation believed, as it had stated during the previous session of the General Assembly, that necessity should not be admitted as a ground for precluding the wrongfulness of an act of an international organization. In terms of power and function, no automatic parallel could be drawn between an international organization and a State, and international practice did not provide sound support for the invocation of necessity by an international organization. Furthermore, almost all issues currently addressed by important international organizations had a bearing on the interests of the international community as a whole, so that draft article 22 might allow an international organization to justify an international wrongful act by invoking at will the necessity of safeguarding an interest of the international community. Precedents were not rare where an international organization had been subject to manipulation or abuse by its member States. His delegation suggested that the draft article should be deleted.

9. As used in draft articles 25 to 27, on aid or assistance, direction and control, and coercion by a State with respect to the commission of an internationally wrongful act by an international organization, his delegation inferred that the term "State" could refer to a member or non-member of the international organization. While a State member of an international organization should not be held responsible for an act of the organization merely because it had participated in the decision-making process in accordance with the relevant rules of the organization, a State member having major influence over the commission of an internationally wrongful act by an international organization should bear corresponding responsibility. Since draft articles 25 to 27 could apply to member States, draft article 29 could be seen as a supplement to them. Paragraph 2 of that article provided for the subsidiary nature of the responsibility of a member State, but when a member State played a major or leading role in the commission of an act by an international organization, the main responsibility for the consequences of that act should be placed on the member State.

10. **Ms. Silek** (Hungary) said that the text of the draft articles on the law of transboundary aquifers adopted by the Commission on first reading under the topic of shared natural resources met the overall expectations of Hungary. However, her delegation was disappointed that in draft article 6 on the obligation not to cause significant harm to other aquifer States the Commission had decided to eliminate the provision proposed by the Special Rapporteur concerning compensation when significant harm was caused, even though all appropriate measures had been taken to prevent it. In view of recent developments in the field of international environmental law, whenever an aquifer State caused significant harm to another aquifer State, it should provide adequate compensation in accordance with the polluter-pays principle, regardless of whether it had taken all appropriate prevention measures. The principle and the obligation deriving from it were both well established in other instruments

of international law. The commentary to draft article 6 stated that the issue of compensation had been omitted because it was "covered by other rules of international law, including the draft principles on liability" (para. (6)). That reasoning might not be sound, since international liability was in general based on imputability, but in the field of international environmental law there were exceptions whereby liability could be established strictly on the basis of causing harm.

11. In draft article 11 on prevention, reduction and control of pollution, the term "precautionary approach" had been preferred to "precautionary principle". Hungary was among the countries that considered the precautionary principle to be already established in international environmental law. The inclusion of the principle in the text of the draft articles would contribute greatly to its general acceptance in international law.

12. Her delegation would also like to suggest changes to the definitions of "recharge zone" and "discharge zone" contained in draft article 2, on use of terms. The term "catchment area" used in the definition of "recharge zone" in subparagraph (f) was more commonly used in relation to surface waters. The recharge zone of an aquifer was only that part of a catchment area where infiltration through the soil was significant and/or where surface water contributed directly to the groundwater. Her delegation therefore suggested inserting the words "that part of" before "the catchment area". On the other hand, the definition of "discharge zone" in subparagraph (g) was too narrow, because it covered only those situations where the water originating from an aquifer actually flowed to the surface. A discharge zone could exist without any water being present on the surface; in many areas the upward flow system kept the groundwater table permanently close to the surface. Her delegation therefore suggested the addition of the following clause at the end of subparagraph (g): "or the upward flow system keeps the groundwater table permanently close to the surface".

13. **Mr. Lammers** (Netherlands), speaking on the topic of shared natural resources, said that the Netherlands shared many natural resources with other States or with areas beyond the limits of its national jurisdiction, such as groundwater; mineral deposits, including oil and gas; and migratory species on land, in the air and in the sea. Hence the international regulation of the uses of and impacts on shared nat resources was of the highest significance to country.

14. During previous sessions of the Gen Assembly his Government had expressed its con over the Commission's general approach to the to First of all, it was unhappy about the limited scop the proposed rules. The draft articles currently u consideration related only to the law of transboun aquifers, although it seemed that work on one or m additional sets of rules for other shared nat resources was envisaged following completion of work on aquifers. By taking that approach Commission would be forgoing the opportunity develop an overarching set of rules for all sha natural resources. In particular, it was not clear why proposed set of rules could not have been drafte apply also to gaseous substances and liquid substan other than groundwater. His delegation stro supported the view of the Special Rapporteur consideration should be given to oil and gas during second reading of the draft articles, as indeed it sho have been during the first reading.

15. On the other hand, his delegation shared Commission's view that it was premature to reac conclusion on the question of the final form of the d articles in the light of the differing views expressed States. His delegation appreciated the cauti approach of the Commission and suggested that question should be revisited only after due attent had been given to the application of the draft article gaseous substances and liquid substances other t groundwater. His Government also agreed with Commission that, in the case of groundwaters other liquids and gases, the development of bilat and regional agreements was still in an embryo stage and a framework for cooperation remained to properly developed. It therefore fully endorsed drafting and placement of draft article 19, on bilate and regional agreements and arrangements, to refl the change in form from that of a framew convention.

16. In the commentary to draft article 1, on scope, Commission noted that the dual application of provisions of the 1997 Convention on the Law of N navigational Uses of International Watercourses the draft articles on the law of transboundary aquif would not in principle cause any problem, as th legal regimes would not be expected to confl

(para. (2)). Yet, in the draft articles the principle of equitable and reasonable utilization had been redefined in order to make it applicable to non-renewable resources. His Government agreed with the application in the draft articles of the principle of maximizing the long-term benefits in the case of non-renewable resources, as opposed to the principle of sustainable utilization applicable to renewable resources. However, in that respect there was a potential for conflict between the two legal regimes. Further clarification was required to explain how the application of two different definitions of the same term to aquifers and aquifer systems hydraulically connected to international watercourses could be reconciled.

17. The definition of "aquifer State" in draft article 2 was too limited. Aquifers and aquifer systems could be found not only in the territory of a State but also in areas under its jurisdiction or control but outside its territory. Moreover, when the Commission considered the application of the draft articles to all shared gaseous and liquid substances, it would be necessary to revisit the definition, bearing in mind the resources to be found under the continental shelf.

18. With regard to draft article 6, on obligation not to cause significant harm to other aquifer States, the commentary to paragraph 1 correctly presented prevention, which in case of non-compliance could entail State responsibility, as a duty of due diligence. In paragraph 3, which dealt with the situation where significant harm had been caused despite due diligence, his Government did not agree with the deletion of the reference to compensation. Although international law on international liability for injurious consequences arising out of acts not prohibited by international law had developed in recent years, including through the elaboration of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, those developments did not justify the deletion of a mention of compensation, in particular because the draft principles would apply only to hazardous activities relating to the use of aquifers and aquifer systems and would not cover non-hazardous activities. Furthermore, the cross-reference to draft articles 4 and 5, both concerned with equitable and reasonable utilization, linked the question of compensation to the interplay of those two draft articles. In specific circumstances, the result might be that it was not reasonable to require the payment of compensation for significant harm if the duty of due diligence was complied with. With regard to the Commission's use of the term "precautionary approach" instead of "precautionary principle" in draft article 11, his Government's view was that the precautionary principle was part and parcel of customary international law. Irrespective of that consideration, it preferred the term "precautionary principle" in the draft articles.

19. With respect to draft article 16 on emergency situations, although his Government sympathized with the objective of obliging States to provide scientific, technical, logistical and other cooperation to other States experiencing an emergency, it doubted that the provision reflected customary international law. States were obliged to consider responding to requests for assistance, but it was not incumbent on them to provide it. The use of the word "cooperation" merely obscured the law on that point. Similarly, his Government was sympathetic to the derogation provision of paragraph 3 whereby an aquifer State was permitted to disregard two basic obligations, namely, the principle of equitable and reasonable utilization and the obligation not to cause significant harm to other aquifer States, in order to protect vital human needs. However, it was not convinced that a special derogation provision was needed in addition to a State's right to invoke circumstances precluding wrongfulness to justify non-compliance with a particular obligation. The invocation of such circumstances was subject to safeguards, and it would merit further consideration whether or not to forgo such safeguards when the aim was to protect vital human needs.

20. On the topic of responsibility of international organizations, with particular regard to draft articles 28 and 29, which concerned the responsibility of States as members of international organizations, it should be borne in mind that the responsibility of members could also be incurred by international organizations which were members of other international organizations. The commentary had therefore rightly indicated that additional provisions would have to be introduced to deal with such parallel situations.

21. Specifically with regard to draft article 28, the legal literature and the case law of the European Court of Human Rights did not exclude the possibility that under certain conditions State responsibility might arise when States attributed competence to international organizations. However, the draft article

as it stood was too broad. If applied to the United Nations, for example, Members States might be held responsible for having conferred general and far-reaching powers on the Security Council, and it was not out of the question that the Security Council might act in such a way that, if States had done the same, those acts would be considered wrongful. However, if Member States could be held responsible for such acts because they had conferred powers on the Security Council in 1945, it would encroach upon the independent legal personality of the United Nations, frustrate the functioning of the Security Council, as members sought to avoid potential responsibility, and hamper the creation of new international organizations or the attribution of the necessary powers to them. In particular, the proposed article 28 disregarded the importance of the implied or inherent powers of international organizations. By focusing on the responsibility of the members for bestowing powers on international organizations, it overlooked a key feature of such organizations, namely, that they were created in areas where States could no longer deal alone with the challenges they faced. It was impossible to ensure that the attribution of powers was always accompanied by all the international obligations by which each of the members of the organization was bound. There was no practice supporting the broad scope of the proposed article 28, and the proposal would inhibit the dynamism required of international organizations. The situation contemplated in draft article 28 was to a certain extent analogous to that considered in draft article 15, which his delegation had criticized the previous year. The lack of precision of draft article 28 was apparent from paragraph (2) of the commentary to it, which stated that "a specific intention of circumvention" was not required and yet excluded the "unwitting result" of providing an international organization with competence, leaving uncertainty as to what the middle ground might be.

22. With regard to draft article 29, it was unfortunate that the Commission had decided to alter the version proposed by the Special Rapporteur, which had stated in a chapeau the general rule that member States were not responsible for an internationally wrongful act of an organization and then laid out two specific exceptions. The Commission's rationale for the modification was that a positive formulation was better than a negative one, but as a consequence the general rule had disappeared. Even though the commentary stated that such a conclusion was implied, it was no longer part of the text of the draft articles, and in fact the implication was not clear. In draft article 29 there was valid justification for departing from the general approach of identifying positively the cases in which a State incurred responsibility. An explicit provision that members did not have subsidiary responsibility except in two specific cases would better reflect the specific nature of international organizations and protect their autonomy and would be in the collective interest of the members of international organizations. If member States knew that they were potentially liable for contractual damages or tortious harm caused by acts of their organization, they would intervene in virtually all decision-making, and the independent personality of the international organization would become increasingly a sham.

23. In paragraph 28 of its report, the Commission asked whether members of an international organization, even though they were not responsible for the wrongful act of the organization, nevertheless had an obligation to provide compensation, should the organization not be in a position to do so. His delegation saw no basis for such an obligation. In practice, members might decide to make ex gratia payments to an injured party, but there was no reason why they should be obliged to pay compensation if they bore no responsibility for the internationally wrongful act. In any case, from a practical standpoint it might be unworkable if an injured party had to approach all members individually. Moreover, to impose such an obligation would carry the risk he had mentioned earlier that members would feel tempted to intervene in virtually all decisions of the organization.

24. A better approach would be to improve as much as possible the rules and mechanisms to ensure that the international organization responsible for an internationally wrongful act were in a position to provide compensation to injured parties. According to the Commission's definition (draft article 2), an international organization possessed international legal personality, and with such personality came not only rights but obligations. One of the key obligations of international legal persons was to bear responsibility for their internationally wrongful acts. Inability to do so would sooner or later affect the organization's ability to operate autonomously. Ultimately it was in the members' common interest to ensure that their organization could meet its obligations. Hence members must put their organization in a position to

provide compensation to a party that was injured as a result of the organization's internationally wrongful act. The costs involved were costs of the organization that must be paid from the organization's budget, in most cases derived from the contributions of members as decided by the organization's plenary organ. Members had a binding legal obligation to pay their contributions to international organizations, thereby enabling them to provide compensation to injured parties.

25. With regard to the Commission's second question in paragraph 28 of its report, it was hard to imagine how a serious breach of an obligation could be committed under a peremptory norm of general international law, since a constituent instrument that provided for such a power would be void under the terms of article 53 of the Vienna Convention on the Law of Treaties. The only case in which the question could arise was if an international organization acted *ultra vires*. Nevertheless, the introduction of a provision for international organizations parallel to article 41, paragraph 1, of the articles on responsibility of States for internationally wrongful acts could do no harm. There was no reason why there should not be an obligation for States and also international organizations to cooperate to bring to an end a serious breach of a *jus cogens* obligation of an international organization, and there was nothing in the specific nature of international organizations that would justify departing from the parallel rule for State responsibility.

26. **Ms. Harrington** (Canada) said that many of the topics on the Commission's agenda could not be dealt with by lawyers operating in isolation. The Commission's willingness to seek expert advice about management of transboundary aquifers was therefore sound practice which should be encouraged.

27. The 1997 Convention on the Law of Non-navigational Uses of International Watercourses might not be the most appropriate model on which to predicate the principles governing transboundary aquifers, since the Convention had not yet gained wide acceptance among States and the principle of "equitable and reasonable utilization" ought to be compared with other approaches found in certain bilateral arrangements. The draft articles would have to be studied in order to see whether they provided a basis for a broad international regime on the subject and what implications they might have for certain transboundary aquifers.

28. There were few transboundary aquifers between Canada and the United States of America. Groundwater had not been specifically covered by the 1909 Boundary Waters Treaty, but the Great Lakes-St. Lawrence River Basin Sustainable Waters Resources Agreement, concluded in 2005, did regulate and limit out-of-basin transfers and included groundwater in its definition of the waters of the Great Lakes. Its provisions were consistent with, and subordinate to, the Boundary Waters Treaty.

29. The success of the International Joint Commission established under that treaty had demonstrated the value of cooperative management schemes when dealing with transboundary waters. The International Law Commission should therefore devote more consideration to the manner in which the development of such regimes could be fostered by the draft articles. It was, however, not clear whether the latter Commission really intended to place States under an obligation to establish "joint mechanisms", as the wording of draft article 13 suggested or whether such an obligation would actually be of value. In fact, draft principles might do more than draft articles to promote the long-term development of the law in areas where future State practice would be useful in cementing the Commission's approach.

30. **Mr. Alday** (Mexico), noting the substantial input of technical experts to the draft articles on the law of transboundary aquifers adopted by the Commission on first reading, said that the use of technical terms would facilitate the interpretation of the draft articles by scientists and managers of the resources in question, and that in turn would make for their efficient and sustainable use.

31. Although the 1997 Convention on the Law of Non-navigational Uses of International Watercourses had not yet entered into force, it constituted an indispensable point of reference when broaching the subject of transboundary aquifers, particularly with respect to the application of the general principles of cooperation and the means of preventing, reducing and controlling pollution. The reference by the International Court of Justice to the Convention in its judgment in the case of *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)* confirmed its pertinence.

32. Nevertheless, it was necessary to establish a specific regime for transboundary aquifers which were non-renewable or slow to recharge. Once the

Commission had completed its codification work on groundwaters, it should turn its attention to the other shared natural resources of oil and natural gas. The provisions on the utilization of finite natural resources would closely resemble one another.

33. As far as the scope of the draft articles was concerned, it was essential to clarify the rules applying to transboundary aquifers which were hydraulically connected with international watercourses, since, as the draft articles stood, those aquifer systems would be subject to both the provisions of the 1997 Convention on the Law of Non-navigational Uses of International Watercourses and the draft articles. Although, in principle, that situation should not give rise to any difficulties, since it was to be hoped that the two legal regimes would not conflict with one another, it would be desirable to include an article on the relationship between both texts.

34. The inclusion within the scope of the draft articles of activities unconnected with the utilization of transboundary aquifers but likely to have an impact on them was of particular importance. It was equally vital to insert a reference to the activities of non-aquifer States which could have an impact on aquifers.

35. While equitable and reasonable utilization should undoubtedly constitute the basic principle governing the use of shared natural resources, an explicit reference to sustainable utilization would have been preferable to the current wording of draft article 4, subparagraph (d), since it was questionable whether the term "effective functioning" had the same meaning. Moreover, it was debatable whether the notion of sustainability could be applied to the exploitation of non-recharging transboundary aquifers. Furthermore, since their exploitation would inevitably lead to their exhaustion, it was incorrect to speak of their utilization. It was therefore necessary to clarify the application of that notion to the various kinds of transboundary aquifers.

36. The interpretation of draft article 4, subparagraph (b), might likewise give rise to controversy because the notion of "aim" did not make it clear what the compliance threshold was, namely whether the subparagraph laid down an obligation and, if so, whether the obligation was to achieve results or to engage in some particular conduct. Similarly, in subparagraph (c), the reference to the individual or joint establishment of an overall utilization plan might place upstream States in a more powerful position, in that any decision on their part would not have the same repercussions on the utilization of a transboundary aquifer as a similar decision taken by downstream States.

37. The Drafting Committee's text seemed to focus on the harm caused to an aquifer State and did not pay sufficient heed to the protection of the resource itself: the aquifer and the water it contained. While the inclusion in draft article 11 of the words "that may cause significant harm to other aquifer States" was felicitous, draft article 13 should have laid greater emphasis on the obligations of managers of aquifers by going beyond the obligation to enter into consultations and providing for dispute-settlement mechanisms. Moreover, failure to comply with the obligation not to cause harm should entail consequences; for example if a State caused irreversible harm to a transboundary aquifer, the draft articles should specify what kind of responsibility would be incurred as a result of such conduct and on what conditions an affected State might obtain reparation. Draft articles 7 and 8 ought to include some mention of capacity-building.

38. The draft articles proposed by the Drafting Committee provided a suitable basis for a future convention on the subject, as they took account of contemporary international practice and of the need to balance a State's sovereignty over the natural resources in its territory with the necessity of guaranteeing a reasonable and sustainable exploitation of them.

39. **Mr. Roelants de Stappers** (Belgium), referring to Chapter VII of the Commission's report, said that draft article 28 might be erroneously interpreted as demanding that international organizations should respect all the international obligations of their member States, which was not legally correct, desirable or practicable. In order to avoid such an interpretation, the commentary to that draft article should delineate more exactly the scope of the notion "provision of competence" by a State to an international organization. The term should be confined to instances where the provision of competence clearly implied, in particular circumstances, a way in which a member State could circumvent its international obligations on the basis of the organization's constituent instrument.

40. The Commission's formulation of draft article 29 seemed to answer the first of the two questions in

paragraph 28 of the report by specifying in paragraph 1 the cases in which a State member of an international organization was responsible for an internationally wrongful act. That paragraph appeared to suggest that member States were not responsible for the wrongful acts committed by an international organization. Wording should be added to the end of paragraph 2 to the effect that a State's international responsibility was subsidiary to that of the international organization, since several States could incur responsibility in pursuance of draft article 29, paragraph 1, in which case, the States' respective responsibility would be joint and not several, in keeping with article 47 of the articles on responsibility of States for internationally wrongful acts.

41. If the internationally wrongful act had been committed by the international organization, if the members of that organization therefore incurred no responsibility for that act, if the organization, as an international organization, had an international legal personality separate from that of its members and if its legal personality permitted the organization to behave as an independent legal person with its own rights and obligations, it was impossible to see how the members of the organization could be obliged to compensate the injured party. In the *International Tin Council* case, the British courts had clearly ruled that an international organization bore responsibility separate from that of its member States on account of its having legal personality.

42. Hence the answer to the Commission's first question must be in the negative, subject to two qualifications. The first was that the principle was without prejudice to the members' obligations vis-à-vis the international organization, but not vis-à-vis the third party injured by the international organization. In other words, if within its field of competence, the international organization was faced with new obligations resulting from the exercise of powers conferred on it by its member States, including reparation for an unlawful act connected with those powers, it could ask for supplementary contributions from its members in order to meet those obligations. If those contributions were in keeping with the law of the international organization, the members would have to comply. That did not signify that the members were under an obligation to make reparation to the injured third party or that the latter could institute direct or indirect action against the members. The second qualification was that there was nothing to prevent members from granting ex gratia compensation, if they deemed it wise to do so in the light of the circumstances.

43. The answer to the second question in paragraph 28 of the report was obviously in the affirmative. Further justification was, however, required on account of the abundance of sources. Moreover, three points were unclear. First, did the obligation to cooperate set forth in article 41, paragraph 1, of the articles on responsibility of States for internationally wrongful acts also apply if the serious breach of a peremptory norm had been committed by an international organization? If States must cooperate in order to bring to an end a serious breach of a *jus cogens* norm when it was committed by a State, it was impossible to see why the obligation should be different when the breach could be attributed to an international organization. What mattered was not the status of the wrongdoer (a State or an international organization) but the seriousness of the act to which an end had to be put. Once *jus cogens* norms became *erga omnes* norms, they were obviously binding on international organizations as well. If *jus cogens* bound international organizations in the same way as it did States, it was logical to conclude that the obligation to cooperate could be transposed to international organizations.

44. Secondly, was the obligation to cooperate in order to bring to an end a breach of *jus cogens* attributable to a State or an international organization customary in nature? The commentary to article 41, paragraph 1, of the articles on responsibility of States for internationally wrongful acts seemed to cast some doubt on the customary nature of the obligation. Although the Commission did not go so far as to assent that it was an obligation under positive law, that position was tenable given that *jus cogens* encompassed the prohibition of aggression, the ban on torture, the fundamental rules of international humanitarian law and the right of peoples to self-determination. That list could be supplemented with the prohibition of genocide, slavery and forced labour and the ban on all racial discrimination. The obligation of States to cooperate in order to bring to an end breaches of those rules was thus embodied in various texts, which were often universal and binding.

45. Thirdly, was that obligation to cooperate also binding on international organizations? To the extent that *jus cogens* norms were *erga omnes* norm, they

were binding on the whole of the international community, including international organizations. Hence the obligation to cooperate obviously extended to the latter, which could therefore be found guilty of having failed in their duty to take action to ensure respect for *jus cogens* norms.

46. That obligation was an obligation to achieve a result in the form of the effective cooperation of a State and/or an international organization rather than the cessation of the serious breach which the cooperation was supposed to secure. The obligation was not in itself a *jus cogens* rule and would be applied without prejudice to the pertinent provisions of the Charter of the United Nations. For that reason, a saving clause, modelled on article 59 of the articles on responsibility of States for internationally wrongful acts, should be added at the end of the draft articles on responsibility of international organizations.

47. **Ms. Escobar** (Spain) said that, although the Special Rapporteur had been wise to adhere closely to the articles on responsibility of States for internationally wrongful acts when drawing up the draft articles on circumstances precluding the wrongfulness of acts by international organizations, it was doubtful whether some of the grounds as currently formulated, were fully applicable to international organizations.

48. Draft articles 17, 20, 21, 23 and 24 were generally acceptable but draft article 18, concerning self-defence, did not sufficiently reflect the fact that the concept of self-defence as applied to international organizations differed considerably from the concept of self-defence as applied to States. Paradoxically, that fact was recognized in the commentaries to draft article 18. It should therefore form the subject of thorough debate in the future.

49. Necessity should preclude the unlawfulness of an act attributable to an international organization but only in certain circumstances. Those circumstances had been noted in the commentaries to draft article 22. Nevertheless, the interest to be safeguarded and its scope gave rise to some misgivings. The Commission had opted for a formula which required the cumulative fulfilling of two conditions: the interest had to be an essential interest of the international community as a whole and its protection must constitute a function of the international organization. The second condition did not give rise to any objections in view of the eminently functional character of international organizations, but the first condition was less acceptable. The determining factor for defining necessity must be the function of the organization. Hence, there was no reason why necessity should not be relied upon in order to defend an interest of the international organization or an essential interest of a member State whose defence formed part of the organization's functions. For that reason, draft article 22 should be revised.

50. The wording of draft article 28 was rather imprecise. In particular, the use of the term "circumvents" when read in conjunction with the ambiguous expression "providing the organization with competence in relation to that obligation" did not sufficiently safeguard the position of a State which, in good faith and without any wrongful intent, provided an international organization with competence in areas which could in some way be related to international obligations assumed by the State outside the organization. That could result in the establishment of objective responsibility, which was unacceptable. Draft article 28 therefore needed to be rethought to take account of two factors: on the one hand the gradual widening of the material scope of international organizations' operations and the resulting impact on the many and various obligations assumed by member States within and outside the organization; and, on the other, the different types of international organizations and therefore the differing status of member States within them.

51. With regard to the precept of subsidiary responsibility in draft article 29, her delegation could endorse its spirit but felt that the meaning of phrases such as "has accepted responsibility" and "has led the injured party to rely on its responsibility" had not been sufficiently elucidated in the commentary and that draft article 29 should therefore be re-examined.

52. Turning to the two questions posed in paragraph 28 of the Commission's report, she said that any answer to the first question must take a variety of factors into account: first, the need to preserve the principle of the separate legal personality of the organization and its member States; secondly, the no less important necessity of safeguarding the principle that, within the framework of international responsibility for a wrongful act, the obligation to provide compensation flowed from the finding that a wrongful act had taken place and hence that obligation

lay with the author of the wrongful act; thirdly, the fact that, according to the general theory of responsibility, those legal subjects which were beforehand generally in a position to act as guarantor for the author of the wrongful act giving rise to responsibility had a subsidiary obligation to provide compensation; and, lastly, the person in question must have expressly agreed to assume subsidiary responsibility. Those circumstances were, on the whole, difficult to apply to a member State of an international organization.

53. As a general rule, and save as otherwise provided in the treaties establishing international organizations or other international instruments to which the State concerned was a party, the member States of an international organization which were not responsible for an internationally wrongful act committed by the organization were not obliged to compensate the injured party if the organization was not in a position to do so.

54. As for the second question in paragraph 28, there were not sufficient grounds *a priori* for concluding that, in the event of an international organization committing a serious breach of an obligation stemming from a peremptory norm, a regime different to that laid down for cases in which the same conduct would be attributable to a State should apply. The draft articles on responsibility of international organizations should therefore also include an obligation on the part of States and other international organizations to cooperate to bring to an end, by lawful means, a breach of those norms by an international organization.

55. **Mr. Tajima** (Japan) said that groundwater was a vital resource required by all human beings in order to sustain daily life. It was therefore most appropriate that the Commission had chosen transboundary groundwaters as the first subject to be studied as part of the topic of shared natural resources. The Commission had rightly steered clear of any overambitious attempt to establish a wide range of rules and principles which would also apply to other resources. Instead it had focused on the formulation of a legal framework which paid due heed to the existing shortage of groundwater resources as a result of overexploitation and pollution. The Commission should be guided by Governments' comments when it decided what form the final instrument should take.

56. The recently adopted draft articles concerning circumstances precluding the wrongfulness of an act of an international organization closely followed the articles on responsibility of States for internationally wrongful acts. It was, however, doubtful whether that approach was really advisable, since international organizations were established by agreement between States for certain objects and purposes. In some situations, it might be possible to find that international organizations were in breach of an international obligation.

57. Since Article 51 of the Charter of the United Nations did not directly apply to the self-defence of international organizations, draft article 18 should take account of the difference between States and international organizations.

58. Member States could not be deemed responsible for an internationally wrongful act of an organization. For that reason, draft article 29 ought to be discussed further when the Commission considered the issue of compensation. Although it was not clear what peremptory norms applied to international organizations, it would seem that any violation of those norms by an international organization would usually be the result of *ultra vires* action by the organization.

59. **Ms. Belliard** (France), commenting on the draft articles on the responsibility of international organizations, said that her delegation had no difficulty with draft articles 17 to 24. Since there was no reason, in dealing with the present topic, for diverging from the rules applicable to States, it was appropriate to make use of the corresponding articles adopted in 2001 on State responsibility for internationally wrongful acts. However, the wording of draft article 22, on necessity, was a departure from that approach. Paragraph 1 (a) contained a very restricted definition of necessity. Moreover, the reference to "an essential interest of the international community as a whole when the organization has [...] the function to protect that interest" would have the immediate consequence of preventing regional organizations from invoking a situation of necessity. That additional restriction did not appear justified, especially given that the articles on State responsibility placed strict conditions on the invocation of necessity. Her delegation would prefer to redefine "an essential interest" in paragraph 1 (a) of draft article 22 as: "an essential interest that the organization, in accordance with international law, has the function to protect".

60. She had no objection to draft articles 25 to 27 but wondered whether a saving clause, accompanied by a commentary, would not have been sufficient instead. Determining what constituted "aid or assistance" in practice could prove difficult. According to the commentary, the influence that might amount to aid or assistance could not simply consist in participation in the decision-making process of the organization according to the pertinent rules of the organization. However, the commentary also mentioned possible "borderline cases", without spelling out what they might be. That made it more difficult to pin down the precise scope of draft articles 25 to 27. The commentary to draft article 25 should indicate a clear distinction between the situation envisaged in that article and the situation referred to in draft article 15, where member States of an organization were implementing one of its decisions.

61. Draft article 28 could be far-reaching in scope, since the nature of the responsibility arising under it did not require a deliberate intention on the part of the member State to evade an international obligation by conferring a particular kind of competence on the international organization. A member State of an organization should incur responsibility only when there was no doubt that its intention in conferring competence was to avoid complying with its international obligations. The cases cited in the commentary to draft article 28 did not, in her view, justify attributing such wide responsibility to a member State of an organization.

62. She had no difficulty with draft article 29, paragraph 1 (a) and paragraph 2. However, paragraph 1 (b), which made a State member of an international organization responsible for the latter's internationally wrongful act if "it has led the injured party to rely on its responsibility" was vaguely worded and might result in a State incurring responsibility merely because it was a member of the organization. In any event, if the acceptance referred to in paragraph 1 (a) included tacit acceptance, the provision in paragraph 1 (b) was unnecessary.

63. The Commission had asked for the views of delegations on whether members of an international organization that were not responsible for an internationally wrongful act of that organization had an obligation to provide compensation to the injured party if the organization itself could not do so. To frame such an obligation would be to deny the standing of the organization as an entity with international legal personality and responsibility for its own acts. The jurisprudence of the *Chorzów Factory* case should apply as much to international organizations as to States. Special arrangements could of course be made, in the constituent instrument of an international organization, for its members to contribute to the indemnification of an injured party.

64. The Commission had also asked whether States and other international organizations were under an obligation to cooperate to put an end, by lawful means, to a serious breach by another organization of an obligation under a peremptory norm of general international law. Although the duty of cooperation was certainly part of the progressive development of international law, there was no apparent justification for a departure on that point from the articles on State responsibility.

65. **Mr. Nesi** (Italy), commenting on the draft articles on the law of transboundary aquifers, said that they provided useful guidance for States on the principles and rules to be included in an agreement concerning a transboundary aquifer. They seemed to strike an appropriate balance between the need to utilize the aquifers and the need to protect them in the long term. They would also remind non-aquifer States of the need to cooperate with aquifer States to protect an aquifer when its recharge or discharge zone was situated on the territory of a non-aquifer State.

66. Turning to the draft articles on the responsibility of international organizations, he said that the somewhat restricted approach adopted in draft article 29 to the responsibility of a member State of an organization for an internationally wrongful act of the organization appeared to be in line with the prevailing international practice, which gave due weight to the separate legal personality of international organizations and made their member States responsible only when that was warranted by the conduct of a member State. If a member State was not held responsible under draft article 29, it seemed to follow that it had no international responsibility to provide compensation to an injured party if the organization was unable to do so. That did not however mean that in such circumstances member States should not strive to provide compensation.

67. On the question of a member State circumventing an international obligation by providing the

organization with competence in relation to that obligation (draft article 28), it seemed reasonable to hold that, generally speaking, a member State could not evade an obligation under international law by delegating competence in that area to an international organization. Whether it incurred responsibility in a particular case would depend on the nature of the obligation and the circumstances of the case. Draft article 28 should identify more clearly the cases in which responsibility arose for a member State.

68. **Mr. Tavares** (Portugal) said that his delegation considered the solutions on shared natural resources which the Commission had provided thus far to be well balanced. It saw some resemblance in the scope of the draft articles to certain articles of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the United Nations Convention on the Law of the Sea. Accordingly, the solutions were consistent with the progressive development of contemporary international law. His delegation reserved the option of making further comments on the draft articles at a later stage.

69. With regard to the approach of the Commission to the sovereignty of aquifer States, his delegation believed that it would be useful to consider taking a more contemporary approach incorporating the doctrine of mitigation. Without questioning State sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory, it might be worthwhile, as a general rule, to consider emphasizing the principle of cooperation between States.

70. Some of the key terms required clarification. His delegation viewed with concern the absence of definitions of "significant harm" (draft article 6) and "significant adverse effect" (draft article 14). It was risky to leave such subjective terms to be interpreted by States on a case-by-case basis in accordance with their interests of the moment. Doing so could place weaker States at an unfair disadvantage, and it complicated the task of distinguishing between the two terms. With regard to draft article 9, consideration should be given to defining the term "ecosystem", as had been done in the draft principles on international liability in case of loss from transboundary harm arising out of hazardous activities. Finally, the phrase "adversely affects, to a significant extent" in draft article 19 was too vague and raised doubts as to how the extent of the effects should be assessed. All the terms to which he had referred could give rise to differing interpretations and lead to non-compliance by States with their obligations. Accordingly, they should be defined in draft article 2, "Use of terms".

71. His delegation was pleased that the draft articles dealt with the right to water and the principles of international environmental law. It looked forward to the Commission's further work on shared natural resources and to seeing the approach it would take to oil and gas along with aquifers. Given the importance of the question of shared natural resources, the final form of the draft articles should be a binding convention.

72. As to the topic of responsibility of international organizations, his delegation continued to believe that the draft articles followed the articles on State responsibility too closely. Many of the examples provided were based on the experience of the European Communities, which was not a good model for the traditional international organizations to which the draft articles were potentially applicable. In many of the draft articles the words "international organization" had been substituted for the word "State" without full account being taken of the differences between them. That was inappropriate, particularly because a convention on responsibility of States did not yet exist. His delegation would continue to advocate in the Committee for highly focused negotiations on such a convention. Assuming one was ultimately adopted, further consideration could be given to adapting some of its provisions to international organizations.

73. Turning to draft articles 17 to 24, on circumstances precluding wrongfulness, he said that it was unclear to his delegation what was meant by the Special Rapporteur's observation in paragraph 84 of the report that although there was no reason to depart from the general approach taken in the context of States, it was recognized that that did not signify that the provisions would apply in the same way in the case of international organizations.

74. With regard to draft article 18, on self-defence, his delegation had difficulty understanding how, in the light of Article 51 of the Charter of the United Nations, self-defence could be exercised by an international organization. Paragraph (2) of the commentary on the draft article went too far in drawing a general rule on the exercise of self-defence by international organizations from the examples provided:

administering a territory or deploying an armed force. Even in those cases, the State whose forces were in the territory or the individual members of those armed forces were the entities exercising self-defence. Analogous difficulties could arise with the draft articles on *force majeure*, distress and necessity.

75. With regard to the innovations introduced by the Special Rapporteur concerning the responsibility of a State in connection with the wrongful act of an international organization, his delegation questioned the advisability of including the proposed draft articles because they addressed the responsibilities of States, not international organizations. If they were to be included, perhaps they could be incorporated in chapter II, on attribution of conduct to an international organization.

76. As to draft article 27, on coercion, his delegation had difficulty understanding how a State could, in practice, coerce an international organization and wished to know whether there were any examples of such coercion. Regarding draft article 28, his delegation did not believe that a single State could provide competence to an international organization. The issue in the draft article appeared to relate more to the allocation of responsibility than to the provision of competence. With respect to draft article 29, his delegation endorsed the principle of separate responsibility of international organizations and their member States and agreed that the fact of membership in an international organization did not entail responsibility. However, paragraph 1 should be reformulated in more precise language in order to preclude the consideration of implied action.

77. As the work of the Special Rapporteur demonstrated, the principles of State responsibility were in general applicable *mutatis mutandis* to the principles of the responsibility of international organizations. It was therefore preferable to concentrate on elaborating a set of draft articles dealing with the specific problems that the issue of responsibility of international organizations entailed, by identifying general abstract rules applicable to the "average" or "typical" international organization. His delegation therefore continued to advocate both a more focused approach to the specific problems raised by the responsibility of international organizations in connection with State responsibility, either in the same convention or in a related instrument, and the inclusion of a clause providing for the non-applicability of the draft articles under consideration to regional integration organizations, for the reasons he had outlined in the Committee in 2005.

78. **Ms. Rivero** (Uruguay) said that her country, as one of the States of the Guaraní Aquifer, had a special interest in the Commission's work on the law of transboundary aquifers. It took a flexible approach to the question of the form the draft articles should ultimately take but would prefer a set of recommendations or guidelines which could be used by the States of the Guaraní Aquifer as a basis for the formulation of bilateral or regional arrangements.

79. There was a need for more scientific and technological information on the subject. Moreover, the topic of shared natural resources also included oil and natural gas, which although similar in some ways to transboundary aquifers were different in other ways and might necessitate a revision of some of the concepts involved. She welcomed the studies carried out by the Food and Agriculture Organization of the United Nations (FAO), the International Hydrological Programme (IHP) and other international entities, which would lend added credence to the conclusions of the Commission.

80. Brazil, Paraguay and Uruguay were working together on arrangements for the monitoring and sustainable exploitation of the water resources of the Guaraní Aquifer and hoped to bring their experience to bear in future on the endeavours of the international community to regulate the use of transboundary aquifers. She welcomed the emphasis in draft article 3 on the sovereignty of aquifer States. While agreeing in general terms with the criteria framed in the draft articles and the commentaries on them, her delegation could not wholly endorse the definition of "significant harm" in draft articles 6 and 11.

81. **Ms. Wilcox** (United States of America), making preliminary comments on the draft articles on the law of transboundary aquifers, said that the work of the Commission represented significant progress in providing a possible framework for the reasonable use and protection of underground aquifers. However, there was still much to be learned on the subject, and there were wide variations in local aquifer conditions and in State practice. Moreover, the draft articles went well beyond current law and practice. Her delegation therefore preferred context-specific arrangements to address pressures on transboundary groundwaters, such

as the hydrological characteristics of the aquifer concerned, present uses and expectations for future uses, climatic conditions and expectations, and economic, social and cultural considerations. Since many States were interested in having some form of global framework to guide them in negotiating their own arrangements, the draft articles could take the form of a convention to which they could accede. The text should include appropriate final articles for a convention and additional articles establishing the relationship between them and other bilateral or regional arrangements. It should not supersede existing bilateral or regional arrangements or limit the options open to States in entering into them. Given the complexity of the subject, the Commission should continue work on that aspect of shared natural resources to its completion, rather than introduce new aspects at the present juncture.

82. Her comments on the draft articles on the responsibility of international organizations were likewise preliminary in nature. Her delegation continued to feel concern at the underlying assumption that the draft articles on State responsibility were an appropriate model for the present draft articles. States shared certain fundamental characteristics, whereas international organizations varied widely in their structure, functions and interests and were not concerned with the issues of sovereignty, citizenship and territorial integrity which concerned States. For example, it was problematic to transpose the principle of "necessity" to international organizations, because that concept was bound up with State interests relating to citizens or territory. The provision in draft article 22 that an international organization could invoke necessity to safeguard "an essential interest" that the organization had "the function to protect" set a vague and potentially expansive standard. It was not even clear whether any such principle existed which was generally applicable to international organizations. The principles governing resort to force in self-defence could not operate in the same way for international organizations as for States, because the organizations were largely creatures of the States constituting them and did not have the same interest in protecting nationals and national sovereignty. Any right they did possess to act in self-defence could not have the same scope as the right of States to do so.

83. She encouraged the Commission, as it continued its work on the topic, to focus on problems arising in the existing practice of international organizations and to give practical examples to illustrate their relevance. On the question, raised in paragraph 28 (a) of the Commission's report, of compensation for an internationally wrongful act committed by an international organization, she did not believe that members of an international organization had any general obligation to provide compensation for acts for which they were not themselves responsible. The Commission should be cautious about elaborating principles that might deter States from participating in the work of international organizations.

84. **Mr. Sardenberg** (Brazil) welcomed the draft articles on the law of transboundary aquifers. Brazil was especially interested in the topic, given that over 70 per cent of the Guaraní Aquifer, one of the world's largest, was located inside its territory. His delegation could accept most of the draft articles. Draft article 8, paragraph 3, was an important provision for the exchange of cooperation; it avoided placing an excessive burden on a State which received a request for information that was not readily available. He also saw merit in the system proposed in draft article 14, paragraph 3, providing for an impartial assessment of the effect of planned activities that might have an impact on transboundary aquifers. The Special Rapporteur recognized that the opening of negotiations between the notifying and the notified States, or the intervention of a fact-finding body, should not result in the suspension of a planned activity. Draft article 7 set adequate parameters for cooperation in achieving the reasonable utilization and appropriate protection of aquifers.

85. While agreeing with the general thrust of the draft articles, his delegation had certain points of concern. A loose formulation of their scope, such as in draft article 1, subparagraph (b), might have the unwanted effect of imposing unnecessary restrictions on the activities permitted in the area of the aquifer. As examples of activities that could have an adverse effect on aquifers or aquifer systems, reference was made in paragraph (6) of the commentary to farming, the use of chemical fertilizers and the construction of subways. The activities covered by draft article 1, subparagraph (b), should be carefully identified, failing which the Commission should consider deleting that provision altogether.

86. The draft articles should contain a specific reference to General Assembly resolution 1803 (XVII)

of 14 December 1962 and the principle of State sovereignty regarding the use of transboundary resources. Such a reference would make clear that water resources belonged to the States where they were located. The expression "shared natural resources" should not in any circumstances be construed so as to bring into question the sovereignty of a State over parts of aquifers lying within its territory. In that sense, the expression "transboundary natural resources" would be a more appropriate title.

87. The final form of the draft should not be prejudged. It dealt with a very sensitive subject, and the full implications of the draft articles were not yet clear. To ensure that the final text received the endorsement of a majority of States Members, Brazil would favour its taking the form of a non-binding declaration by the General Assembly.

88. He concluded by reaffirming the primary role of regional agreements as the most suitable tool for the legal regulation of transboundary aquifers. Such agreements, by providing for the specific aspects of each aquifer or aquifer system, could offer a body of principles acceptable to all neighbouring States. The Commission should focus chiefly on producing a set of principles for the guidance of States in elaborating such agreements.

89. **Mr. Getahun** (Ethiopia) said that in its work on the draft articles on the law of transboundary aquifers the Commission should rely on those provisions of the Convention on the Law of the Non-navigational Uses of International Watercourses that had attracted the widest support in the international community. Accordingly, the inclusion in the text of the principles of State sovereignty over the portion of a transboundary aquifer or aquifer system located in its territory, equitable and reasonable utilization, and international cooperation was appropriate.

90. However, the draft articles developed to ensure implementation of those principles required further adjustment and refinement. For example, draft article 14, on planned activities, would in effect institute a veto system impeding the development of States in which aquifers originated and would impose excessive obligations on those States. The purpose of the draft article was to facilitate the exchange of information and data, issues that were already addressed sufficiently in draft article 8. Draft article 14, coupled with draft article 6, would create an imbalance in the overall structure of the draft articles. Draft article 1, subparagraph (b), further compounded the situation because it would permit any activity that could have an impact on transboundary groundwater. Given the varying capabilities of States with respect to monitoring and compliance with the obligations envisaged, it was particularly important to review the draft articles on monitoring and management.

91. His delegation agreed that a decision on the final form of the draft articles should be deferred. If the draft articles achieved the required balance, a draft convention might be feasible. The Commission should consider incorporating in the draft articles provisions calling for the avoidance of wasteful utilization or practices.

92. Turning to other topics addressed in the Commission's report, he welcomed the adoption by the Commission of the draft articles on diplomatic protection and on international liability in case of loss from transboundary harm arising out of hazardous activities. It also supported the emerging consensus in the Sixth Committee that Member States should be allowed sufficient time to study the draft articles before they were submitted for possible action by the General Assembly. In particular, the draft articles on diplomatic protection should be further refined through wide-ranging negotiations and consultations among Member States.

93. The draft articles on responsibility of international organizations dealt with fundamental principles of international law and would have repercussions on the activities of international organizations and their members. Accordingly, the Commission must pursue broader consultations with Member States and international and regional organizations. Draft article 17, on consent, should be more tightly drafted in order to define what constituted valid consent, the limits of consent, and how those limits were determined. The Commission should also elaborate on the allocation of responsibility between international organizations and their members in situations such as peacekeeping and peace enforcement operations.

94. With regard to the draft guidelines on reservations to treaties, further elucidation of the question of compatibility of reservations with the object and purpose of treaties and the invalidity of reservations to peremptory norms or *jus cogens* would

add clarity to the subject. His delegation cautioned that competence to determine the validity of reservations rested with the States parties concerned.

95. Although his delegation appreciated the work of the Commission with respect to unilateral acts, it was not yet convinced of the advisability of codifying the rule of law in that area, given the absence of sufficient and consistent State practice. Reliance on the provisions of the 1969 Vienna Convention on the Law of Treaties might not be appropriate owing to the obvious differences in the sources of obligations.

96. The Charter of the United Nations and *jus cogens* or peremptory norms of international law should be at the core of the draft articles on the effect of armed conflicts on treaties. Although the intention of the parties to a treaty should be considered, it should not be the main factor. The Commission should keep in mind that the different status of States with respect to adherence to Article 2, paragraph 4, of the Charter, was critical and that the aggressor State and the victim of aggression were not to be treated on an equal footing.

97. His delegation supported all the Commission's suggestions with regard to topics for its long-term programme of work, particularly codification and the development of norms on protection of persons in the event of disasters. The scope of the subject should include more specific treatment of all relevant actions and the omission of factors such as the obligations of transit countries with respect to the principle of access.

98. **Ms. Kamenkova** (Belarus) said that although the Commission had not yet considered elaborating an implementation mechanism for the responsibility of international organizations, the 30 draft articles it had so far presented were a sound basis for a future universal instrument on the subject. She agreed with the Commission that it was now necessary to frame rules governing the responsibility of States for the internationally wrongful acts of international organizations, whether or not they were members of the organizations concerned.

99. However, draft articles 28 and 29 called for further work. The possibility of a State evading its international responsibility by relying on its membership of an international organization was closely bound up with the issue of effective monitoring of the compliance of States with their international obligations in general. The question of a monitoring mechanism must be addressed either in the text of the draft articles, or in the commentary. Draft article 28 should specify that responsibility could arise for a State if it took part, within the international organization, in adopting decisions that were contrary to international law and that conferred competence on the organization or that sanctioned a particular form of conduct by the organization and its members, when the State concerned was aware of the wrongfulness of the decisions. The condition set in draft article 29, paragraph 1 (b), that "it has led the injured party to rely on its responsibility" was too vague. Draft article 29 should make clear in what form a State might accept responsibility as a member of an international organization, for example, in the constituent instrument of the organization, through a decision by one of its organs, in an agreement between the organization and the member State, by tacit consent, or in some other way. The rules in draft articles 28 and 29 should be applied according to the circumstances of each case. She agreed that the responsibility arising under draft article 29 for States members of international organizations must be subsidiary to that arising for the international organization itself and also for States in the situations contemplated in draft articles 25 to 28.

100. Turning to the issues on which the Commission was seeking the views of Governments and international organizations (para. 28), she said that the present view of her delegation on the question of compensation was that it should be regarded as the consequence of the internationally wrongful act committed by an international organization and of responsibility for that act, not a consequence of a State's membership of the organization concerned. There was no rule of international law that made States responsible for all the acts of the international organizations to which they belonged, merely by virtue of their membership. If any such act was internationally wrongful, a State not responsible for the acts had no duty to make compensation for the damage done. If the organization itself was unable to do so, the duty of compensation must be placed on the member States which were responsible, jointly with the organization, for the wrongful act. Nevertheless, in view of the specific activities of different international organizations, a scheme of subsidiary responsibility for compensation could be established as a special rule, for example in cases where the work of the organization was connected with the exploitation of dangerous resources. A provision to that effect could be included in the draft articles. Her delegation was willing to

participate in resolving the issue. It could not be sensible for responsibility for an internationally wrongful act to be laid on the international organization alone, without any of its members being jointly responsible. That outcome would undermine the authority of the organization and restrict the legal rights of victims. One exception to be borne in mind was the abuse of authority by an official of an organization. In such a case the individual concerned should be responsible for all the consequences, including the payment of compensation.

101. Concerning the second issue on which the Commission was inviting the views of delegations, her delegation took the view that all subjects of international law must cooperate to put an end to breaches of obligations under international law, including those arising under a peremptory norm. However, a final decision on that question should only be taken when the Commission had completed work on the basic elements of the topic of the fragmentation of international law. A rule on cooperation must not be used to justify a breach of norms other than peremptory ones. Draft article 22, on necessity, also raised an issue relating to the topic of the fragmentation of international law. Discussion of the rule framed in that draft article would be more productive when the Committee had dealt with the question of hierarchy in international law, *jus cogens* and obligations *erga omnes*.

102. **Mr. Henczel** (Poland) said that the final form of the draft articles should be a draft convention, given the importance of international protection of transboundary aquifers for all States and as a follow-up to the Commission's earlier work on codification of the law of surface waters. If the idea of a convention prevailed, more precise rules should be established concerning the relationship between that instrument and the Convention on the Law of the Non-navigational Uses of International Watercourses. The Commission's experience in adopting the draft articles, along with constructive comments to be offered by States, would facilitate its codification work on other shared natural resources, including oil and gas.

103. His delegation supported the Commission's approach in modelling the draft articles on circumstances precluding wrongfulness on the draft articles on responsibility of States for internationally wrongful acts. Draft article 17, on consent, referred to "valid consent by a State or an international organization", which his delegation understood to relate to acts performed by an international organization within its powers, whether conferred or implied. However, it was conceivable that an organization could give its consent to another international organization to act, for example, in a territory of a member State; such consent would constitute an *ultra vires* act.

104. An act of the type described in paragraph (3) of the commentary to draft article 18 would very likely take place with the knowledge of the Security Council, in which case it would constitute use of force authorized by a political body of the United Nations, rather than self-defence within the meaning of Article 51 of the Charter.

105. His delegation was disappointed that no proposal had been made regarding the wording of draft article 19, on countermeasures. The draft article should contain an explicit reference to the Charter and United Nations law, in order to indicate the possible scope and substantive and procedural limitations to countermeasures taken by an international organization. The provision on countermeasures was closely related to draft article 28, and his delegation could foresee a situation in which an international organization was empowered by its member States to take countermeasures that, if taken by the States, would constitute an internationally wrongful act and, consequently, abuse of power.

106. With regard to draft articles 25 to 30, his delegation generally agreed that international practice and the theoretical concept of the international legal personality of international organizations logically excluded nearly any form of responsibility on the part of member States for the acts of the organization. However, such responsibility could perhaps be accepted in certain situations, such as where a member State acted on behalf of an international organization and in doing so preserved significant freedom of action, in particular, control over operational decisions.

The meeting rose at 1 p.m.

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Chairman: Mr. Onisii (Vice-Chairman) .... (Romania)

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In the absence of Mr. Gómez Robledo (Mexico), Mr. Onisii (Romania), Vice-Chairman, took the Chair.

The meeting was called to order at 4.35 p.m.

Agenda item 78: Report of the International Law Commission on the Work of its fifty-eighth session (*continued*) (A/61/10)

1. **Mr. Lindenmann** (Switzerland), referring to the responsibility of international organizations, said that his delegation continued to have doubts about draft article 27, which provided that the coercing State would be held responsible only if the organization that was being coerced breached one of its obligations. His delegation continued to believe that there was a second hypothetical situation in which a State should be held responsible for coercion of another State or of an international organization, namely, when the act in question constituted an internationally wrongful act of the coercing State. A State could not be allowed to escape its international obligations by coercing another entity — in particular an organization which was not subject to the same international obligations as the State — to breach an international obligation on its behalf.

2. For Switzerland, that was a fundamental principle and was, moreover, recognized in draft article 28, paragraph 2, which stipulated that the provisions of paragraph 1 would apply to a State whether or not the act in question was internationally wrongful for the international organization. In his delegation's view, that principle should apply, *a fortiori*, to situations of coercion. His delegation therefore proposed that draft article 27, subparagraph (a), should be amended to read: "The act would, but for the coercion, be an internationally wrongful act of the international organization or of the coercing State; and". Draft article 14, concerning coercion by an international organization of a State or another international organization, should be similarly amended.

3. With regard to draft article 28, Switzerland endorsed the principle that a State could incur international responsibility by providing an international organization with competence. However, his delegation wondered whether the verb "circumvents" might better be replaced by a more neutral term. Draft article 28 envisaged a situation which was to a certain extent analogous to that covered by draft article 15, but the latter article was much broader in scope, providing that an international organization incurred responsibility not only for its binding decisions, but also for simple recommendations and authorizations. If the two articles were to be brought more into line with each other in the future, his delegation would favour a more restrictive wording of article 15, similar to that of article 28.

4. Draft article 29 was posited on the assumption that a State did not incur responsibility solely as a result of its membership in an international organization. His delegation accepted that hypothesis in principle, although there might be an exception, albeit a rather theoretical one, if the organization in question was a criminal one whose purpose and main activities were contrary to international law. In such a case, membership alone might well suffice to entail responsibility for a State.

5. Concerning the question posed in the report of the Commission in paragraph 28 (a) his delegation believed that the only possible answer was "no". An obligation to compensate could only arise from a prior finding that the State member was responsible for the internationally wrongful act of the organization. A more interesting question might be to what extent it was possible really to establish whether a member of an international organization was or was not responsible for the acts of that organization and, more specifically, whether draft articles 25 to 29, especially the saving clause in draft article 29, were sufficiently comprehensive to cover all situations. His delegation was not entirely sure, and perhaps the Commission's question indicated that it, too, had doubts.

6. His delegation wondered, in particular, whether there existed a more general but subsidiary responsibility of members of an international organization. Every member of an international organization had an ongoing general obligation to cooperate in good faith with the other members and with the organs of the organization in order to ensure that the acts of the organization were compatible with the law applicable to it. Of course, the extent of such a positive obligation would depend on factors such as the purpose of the organization, the risk that its activities might inherently be contrary to international law and the real influence of members in the decision-making processes of the organization. Nevertheless, his delegation was of the view that none of those factors altered the principle that a member State should incur

responsibility not only through the provision of competence, as envisaged in draft article 28, but also on the basis of a continuous obligation to cooperate so that the international organization would be in a position to comply with international law.

7. A member of an international organization should not be allowed simply to remain passive in the face of flagrant violations of international law by the organization. If a member consciously ignored such violations in circumstances in which it might reasonably be expected to try to stop them, that member might incur responsibility in situations other than those envisaged in draft articles 25 to 29. Even if an international organization had a separate legal personality, it remained a creation of its member States. His delegation hoped that the Commission would look further at that issue in its future work.

8. As to the Commission's second question, in paragraph 28 (b), concerning whether States and other international organizations had an obligation to cooperate to bring to an end a serious breach by an international organization of an obligation under a peremptory norm of general international law, his delegation's answer was "yes". As he had just said, for the members of an organization, there might be an obligation to cooperate that extended beyond the prevention of violations of *jus cogens* only. For non-member States or organizations, the obligation to cooperate with a view to bringing to an end the breach of a peremptory norm under general international law followed from the reasoning given by the Commission itself for article 41 of the articles on State responsibility. The content of paragraph 1 of that article should be reproduced mutatis mutandis in the draft articles on the responsibility of international organizations.

9. **Mr. Hmoud** (Jordan) welcomed the Commission's adoption of the draft articles on shared natural resources, which, until they were adopted in some final form by the international community, would serve as useful guiding principles for States in dealing with issues relating to transboundary waters. His delegation believed that the Commission should also eventually deal with oil and natural gas, either on second reading of the present draft articles or in a separate set of draft articles.

10. With regard to draft article 1, his delegation remained of the view that the qualification of activities as having or likely to have an impact on the aquifer or aquifer system was not necessary. Draft articles 6, 10 and 14, for example, all had different qualifications for activities other than utilization, ranging from "effect" to "significant harm". Such qualifications did not necessarily overlap with the "impact" threshold. It might therefore be appropriate to remove the terms "impact" and "likely impact" and refer simply to "other activities as described in the [draft] articles". As to draft article 3, his delegation welcomed the assertion that the aquifer State had sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory, but felt that it might be important also to clarify that such aquifers were under the exclusive sovereignty of the aquifer States.

11. Concerning draft article 4, his delegation welcomed the clarification in the commentary on the sustainability of recharging aquifers. As such aquifers sometimes took hundreds or thousands of years to charge, it would be unrealistic to demand that the aquifer States sustain the aquifer's water levels. What constituted reasonable utilization of such aquifers had to be determined on a case-by-case basis. As long as no wasteful utilization or abuse took place and other obligations were met by the aquifer State(s), then utilization, even if it led to depletion, should be considered reasonable. With regard to the obligation to establish an overall utilization plan based on the agreed lifespan of the aquifer, his delegation would prefer to replace the term "agreed" by "predicted", as it was unclear who agreed on the aquifer's lifespan. On the issue of equitable utilization, his delegation reiterated its view that if an aquifer State did not exercise or gave up its right to utilization of the aquifer, then the standard for equitable use by the other aquifer State(s) would be different. Those States should be able to utilize the aquifer without their use being considered inequitable vis-à-vis a State which willingly was not exercising its right.

12. His delegation was pleased with the addition to draft article 5 of a provision concerning contributions to the formation and recharge of an aquifer or aquifer system. It also supported giving special regard to vital human needs in determining what constituted equitable utilization. With respect to draft article 6, his delegation was satisfied with the threshold of "significant harm", which would allow flexibility on a case-by-case basis. Regarding paragraph 2 of that article, it remained of the opinion that the reference to

impact was unnecessary and should be deleted. A State should take measures to prevent the causing of significant harm when undertaking any activity related to the aquifer. His delegation welcomed the removal of the reference to compensation in paragraph 3, believing that other bodies and instruments of international law could deal with the legal consequences of significant harm caused to an aquifer State.

13. Regarding draft article 7, the substitution of the term "appropriate protection" for "adequate protection" was welcome. It would be unrealistic to oblige aquifer States to cooperate for the purpose of providing adequate protection in the case of a non-recharging aquifer. With respect to draft article 9, his delegation was of the view that protection and preservation of ecosystems was better dealt with through bilateral and multilateral arrangements agreed by the aquifer States and third parties whose ecosystems might be affected. Draft article 9 should apply only in the absence of such arrangements. Similarly, the obligations under such arrangements in relation to monitoring, pollution control and management should prevail. However, the draft articles would be important in setting minimum standards for such activities in order to protect the rights of all aquifer States, minimize disputes and optimize effective utilization.

14. His delegation considered draft article 14 to be crucial for the protection of groundwaters against planned activities with potential significant adverse effects. The assessment of the effects of such activities should be based on objective grounds, and the affected State should have the right to consult with the State whose planned activity might affect it, even if the latter had not provided notification of its plans. With regard to the emergency situations covered by draft article 16, while the State within whose territory the emergency occurred might not be liable for it, failing to notify the affected States and to take the other measures envisaged under paragraph 2 might trigger its international responsibility under the draft articles.

15. Finally, with regard to draft article 19, the relationship between bilateral and regional agreements and arrangements and the draft articles would eventually have to be determined in the final form of the articles. Concerning the prohibition of agreements that would adversely affect excluded aquifer States, the article should expressly state that such States would negotiate in good faith with the other States regarding the latter's agreements and arrangements.

16. **Mr. Park** Hee-kwon (Republic of Korea), commenting on the draft articles on shared natural resources, noted that the Special Rapporteur intended to expand his work beyond aquifers to include oil and gas. He was concerned that such a move could face opposition from oil- and gas-producing States that recognized those resources as property under their sovereign rights. With respect to the final form of the draft articles, his delegation supported a binding instrument in the form of a framework convention, which should include provisions on the rights and obligations of non-aquifer States to encourage them to become parties to the instrument. His delegation also believed that the draft articles should include a dispute settlement mechanism similar to the one provided for under article 33 of the 1997 Watercourses Convention.

17. Turning to chapter VII of the Commission's report, he said that rules on responsibility of international organizations were essential to establishing a comprehensive framework for the law of international responsibility. The adoption of the draft articles would be an accomplishment for the Commission, comparable to the adoption of the Vienna Conventions on the Law of Treaties and the articles on State responsibility.

18. The responsibility of States and of international organizations for internationally wrongful acts should be determined within a uniform system, analogous to the relationship between inter-State treaties and treaties between States and international organizations or between international organizations. A basic framework of common headings and provisions should be maintained, with revisions and additions reflecting the distinctive qualities of each international organization. The four reports of the Special Rapporteur had so far preserved that structure. The Commission should do its best to avoid any undermining of that uniformity in the future.

19. Given that international organizations possessed independent legal personalities, it was no easy task to determine international responsibility in connection with the act of an international organization — the subject matter of draft articles 25 to 30. The task was even more difficult if a State happened to be associated with a particular act by an international organization. If an act was attributed to an international organization and a State was associated with that act, there should be a fundamental review to determine whether the act

should be considered the responsibility of the organization or of the State.

20. Referring to the questions on the draft articles posed in paragraph 28 of the report, he said that two conflicting legal interests should be borne in mind in any discussion of the responsibility of a State member of an international organization for the internationally wrongful act of that organization, namely protection of the injured third party and protection of member States' interests. The current text of draft article 29 seemed to be inadequate in that respect.

21. To ensure the protection of the injured third party, especially when the victim was a person or an entity, draft article 29 should be complemented by other provisions on exhaustion of local remedies and the jurisdictional immunity of international organizations because, in most cases, intergovernmental organizations and their agents were immune from local jurisdiction. Consequently, the legal remedies available for bringing claims against an international organization were not available to persons or entities. Concerning the protection of member States' interests, the formulation of draft article 29, paragraph 1 (a), was vague and might result in a member State being obliged to provide compensation contrary to its own intention. Acceptance of obligations should always be explicit. The application of implied acceptance was too burdensome for member States.

22. There was a need for in-depth discussion of scenarios in which an international organization and a member State were both found internationally responsible for an internationally wrongful act, in order to determine whether the organization and the State were jointly or separately responsible and, in the latter case, which party had the primary and which the secondary responsibility.

23. **Ms. Williams** (United Kingdom) said that, although the United Kingdom was not directly affected by the Commission's work on transboundary aquifers and aquifer systems, it recognized the importance to the international community of the draft articles on that topic. The Commission should, however, exercise caution by not over-generalizing the issues raised by the topic of shared natural resources. Guidelines formulated for one natural resource might not be suitable for application to other types of natural resource. Moreover, the Commission should consider the context of the resource in question. In some cases, the sharing of natural resources was complex or sensitive. Bilateral or regional arrangements might be more appropriate in such cases than general articles or principles.

24. Her delegation appreciated the Commission's work on the difficult topic of responsibility of international organizations. However, it remained concerned about the wholesale application of the articles on State responsibility to international organizations without proper consideration of the important differences between States and organizations and with no allowance for the diversity of types of international organization and of their functions. It urged the Commission to explore existing practice and to consider carefully the different issues involved. The two questions posed by the Commission touched on complex matters, and there existed limited State practice in those areas. Her Government would respond to the questions in writing at a later date.

25. With regard to the draft articles on circumstances precluding wrongfulness, available practice was limited, and the Commission was right to conclude that there should not be a presumption that the conditions under which an international organization might invoke a certain circumstance precluding wrongfulness were the same as those applicable to States. However, despite that conclusion, draft articles 17 to 24 largely adopted the corresponding provisions of the articles on State responsibility. Her delegation urged the Commission to reconsider its decision not to depart from the general approach adopted for States.

26. Regarding draft article 18, there was a need for further discussion as to how self-defence would apply in relation to an international organization. Much of the discussion in the commentary was based on the use of self-defence in peacekeeping operations, but the right of self-defence arose in many cases from the terms of the mandate of a peacekeeping force. It was difficult to extrapolate from those specific mandates to a wider right that would exist in different circumstances. The considerations that applied to self-defence in the context of international organizations were different from those that applied to the exercise of the right of self-defence by a State. Moreover, as a practical matter, only certain international organizations would ever be in a position to exercise the right of self-defence.

27. Concerning draft article 21, her delegation had similar questions as to how distress would apply to an

international organization, if at all. What kind of situation might allow an international organization to rely on distress as a circumstance precluding wrongfulness? Would distress ever extend to an international organization performing its normal humanitarian functions in respect of persons entrusted to its care?

28. With regard to draft article 22, her delegation recognized the Commission's efforts to accommodate the different views expressed by States in the new formulation of the article. It agreed that, if necessity was to be applied to international organizations as well as States, the scope of that exception must be clearly defined, and the circumstances in which it could be invoked must be more limited than for States. The Commission had attempted to achieve that aim by limiting the exception to the protection of "an essential interest of the international community as a whole". However, further clarification was needed as to what constituted an "essential interest" and when an international organization would have the "function to protect" that interest. More generally, the United Kingdom questioned whether it would ever be appropriate for an international organization to rely on necessity to violate its international obligations.

29. With regard to draft articles 25 to 27, which largely duplicated the corresponding provisions of the articles on State responsibility, there was again little or no State practice available, and the commentary provided no concrete examples of when or how those articles would apply. There were grounds for taking a different approach in the context of international organizations. Moreover, the draft articles did not adequately address the different nature of the relationship between States and international organizations in that context. The Commission should provide greater clarification with regard to the application of those draft articles, in particular the definition of "aid or assistance" by a State in the context of an international organization, the circumstances in which a State would "direct and control" the act of an international organization, and the types of act that would constitute coercion of an international organization by a State. It should also delineate more clearly the relationship between the draft articles in question and draft article 29, which offered several possible bases of responsibility for the State.

30. Welcoming the new draft articles 28 and 29 and endorsing the Commission's comments on them, she said that her observations would be of a provisional nature, given that only limited time had been available to consider the text. Her delegation appreciated the general principle behind draft article 28 — that a State should not be able to avoid international responsibility by transferring its functions to an international organization — but considered that the current formulation was too broad and questioned whether the provision accurately reflected the available judicial authorities and whether those authorities, which had a limited application, could support a wider rule. The Commission should consider reformulating draft article 28 in order to recognize the general rule that a State did not incur international responsibility merely by transferring competence to an international organization. Any exception to that general rule must apply only in the narrowest of circumstances. In particular, the notion of "circumvention" required further definition. As had been suggested by other delegations, the Commission might also wish to consider the introduction of some element of bad faith, specific knowledge or deliberate intent, and whether the nature or content of the obligation in question was relevant.

31. Similarly, draft article 29 had too broad a potential application and should reflect the presumption that a State did not as a general rule incur international responsibility for the act of an international organization of which it was a member. That presumption flowed from the general principle of the separate and distinct legal personality of the international organization. In particular, responsibility should not be incurred merely by virtue of such membership. A provision to that effect would be more consistent with the existing judicial authorities. The exceptions set out in draft article 29, particularly the notion of acts leading to reliance, must be more precisely drafted so as to avoid uncertainty as to their interpretation. In addition, more detailed consideration should be given to the issue of whether such responsibility was restricted to third States and to the role of the constituent instrument in determining questions of responsibility. With those points in mind, the Commission should revisit the text of draft article 29.

32. **Ms. Daskalopoulou-Livada** (Greece), welcoming the progress made with regard to the draft articles on the law of transboundary aquifers, noted that no solution had yet been proposed regarding the relationship between the draft articles and the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses. Her delegation took the view that the draft articles should be on an equal footing with the Convention, since they were materially and conceptually tied to it.

33. She welcomed the addition in draft article 1 of subparagraph (b), which took account of the need to cover all activities that might put an aquifer or aquifer system at risk. In article 2, subparagraph (g), the sea should be explicitly included in the list of potential outlets of an aquifer, given its importance and vulnerability. Reliance on the illustrative character of the list was not enough.

34. With regard to draft article 5, the textual innovations introduced were welcome, but the meaning of subparagraph (d) was unclear without the help of the commentary. It might therefore be better to use the wording of the commentary itself, which read "the comparative size of the aquifer in each aquifer State and the comparative importance of the recharge process in each State where the recharge zone is located".

35. In connection with draft article 6, the Commission had recognized the fragility of aquifers but had failed to lower the threshold of harm that aquifers could sustain. Instead, it had maintained the threshold of "significant harm" which had been used in the 1997 Convention with regard to surface waters. Rather than inventing far-fetched meanings for the word "significant", the term "harm" should simply not be qualified at all. Not qualifying harm did not of course mean that even inconsequential harm would constitute a violation of the relevant provision, and the Commission could so indicate if it saw fit.

36. In draft article 7 and subsequent draft articles, the text refrained from imposing an obligation on States to cooperate through joint mechanisms. However, joint mechanisms were so widely used in cooperation between States with regard to transboundary surface waters that the Commission should not hesitate to adopt a mandatory provision on cooperation with regard to groundwaters. Her delegation had no major objections to draft articles 14 to 19 but had not yet had enough time to consider them in detail, given the speed of the Commission's work in that regard. It therefore suggested that the period set for comments by States should be extended to two years.

37. After welcoming the adoption of chapters V and (x) of the draft articles on responsibility of international organizations, she suggested, with regard to draft article 25, that a clarification was needed in the commentary to the effect that relevant intention would be required, as had been specified in the commentary to the corresponding article on State responsibility. Such a clarification was proposed, not only for reasons of consistency with the articles on State responsibility, but also to explain that mere involvement of a member State in the day-to-day functioning of an international organization could not amount to "aid or assistance" giving rise to the responsibility of the State for an act of the organization within the meaning of draft article 25.

38. Draft article 28 was acceptable in principle, but was too wide in its current formulation. Her delegation agreed with paragraph (2) of the commentary, which stated that responsibility could not be avoided by showing the absence of an intention to circumvent the international obligation in question. If, however, intention was irrelevant in that context, States became exposed to responsibility for any act of the organization for which they had transferred competence to that organization. A serious possible consequence was that States might become reluctant to transfer competences to international organizations, fearing that they would be more likely to become liable for wrongful acts of the organization, even if they had not been involved in the commission of the act. To rectify the problem, the scope of application of the article could be limited to cases where the international organization was not itself bound by the obligation breached. Paragraph 2 of the draft article should then be redrafted accordingly.

39. With regard to draft article 29, paragraph 1 (a), the commentary made it clear that a State had to accept responsibility for the act of the organization vis-à-vis the victim of the act and not vis-à-vis the organization itself. That distinction should be reflected in the wording of the draft article. In addition, the applicability of draft article 29, paragraph 1 (b), in the event of a violation of a mixed agreement by the European Community and not its member States was unclear. Lastly, a negative drafting of paragraph 1

would be better, as it would make it clear that no residual responsibility could arise for a State.

40. Chapter (x) should contain a provision on the responsibility of member States in cases where they committed a wrongful act by implementing a binding decision of the organization. Draft article 15 addressed that issue, but only from the point of view of the responsibility of the organization. As far as States were concerned, the articles on State responsibility did not provide sufficient guidance on the matter, because, in the type of case in question, the State was acting as an executing agent of the organization, especially when the addressees of the organization's decision were not afforded any discretion as to the modalities of its implementation. A specific provision to cover that situation was therefore required.

41. **Ms. McIver** (New Zealand) commended the completion of the first reading of the draft articles on shared natural resources, a topic of ever-increasing importance. The Special Rapporteur's approach in seeking assistance from hydrogeologists and other experts had ensured that the text benefited from the best available scientific knowledge and also that the legal norms developed were more understandable to those who worked with aquifers. The way in which a given transboundary aquifer was managed should take account of its specific features and each State's relationship with it. Management arrangements must be worked out in detail by the aquifer States at the regional or subregional level.

42. In view of the fact that the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses was still not in force and that, for similar reasons, an insufficient number of States would be motivated to become parties to a convention on shared natural resources, it might be more effective to cast the final text as recommendatory principles or articles rather than as a convention. An authoritative statement describing international standards and best practice would be immediately influential at the bilateral and regional level.

43. With regard to the draft articles on responsibility of international organizations, her delegation continued to support the Commission's approach of following the scheme of the articles on responsibility of States for internationally wrongful acts unless there was a compelling reason not to do so. It endorsed the principle contained in draft article 28 ("International responsibility in case of provision of competence to an international organization"). A State should not be able to make use of an international organization's separate legal personality to avoid an international obligation. The principle was not in doubt; the challenge lay in finding the most appropriate language in which to express it. That the Commission had done.

44. Her delegation supported the Commission's careful formulation of the principle contained in draft article 29 ("Responsibility of a State member of an international organization for the internationally wrongful act of that organization"). The analysis in the commentary led inevitably to the conclusion that member States could not, as a rule, be responsible for the internationally wrongful act of an international organization. To conclude otherwise would work against the established notion that an international organization had a legal personality separate from that of its members and would thus also have serious consequences for management and effective decision-making within such an organization. In some circumstances, however, member States should have international responsibility, although, as provided for in draft article 29, such circumstances should be restricted to situations in which a State had accepted responsibility or had led an injured party to rely on its responsibility.

45. **Mr. Mohd Radzi** (Malaysia) commended the Commission's successful conclusion of its first reading of the draft articles on shared natural resources. In that connection, he noted that the term "draft articles" was used without prejudice as to the final form of the text and that the text did not include provisions on dispute settlement, final clauses or any article that might prejudice the final form.

46. His delegation welcomed the change made to draft article 12, paragraph 2. Following representations by his delegation at the sixtieth session, the phrase "Aquifer States shall agree on harmonized standards and methodology" had been replaced by the phrase "Aquifer States shall use agreed or harmonized standards and methodology". The previous wording had imposed too heavy an obligation on aquifer States to establish standards and methodologies that were applicable across the board. The new wording meant that certain standards and methodology could be agreed by aquifer States, as required, without a prior need to harmonize existing standards or methodology.

47. His delegation regretted that, in draft article 11, the language had been strengthened to impose an obligation on aquifer States to take a precautionary approach. In his delegation's view, such an obligation must be subject to the capabilities of the States concerned, in line with principle 15 of the Rio Declaration on Environment and Development. With regard to draft article 18, which protected an aquifer State from being compelled to provide data or information the confidentiality of which was essential to its national defence or security, his delegation would like to reiterate its position that protection under the draft article should be extended to industrial secrets and intellectual property.

48. In draft article 5, paragraph 2, the phrase "vital human needs" should be defined in order to avoid uncertainty of interpretation. To that end, his delegation would favour inserting in the draft article the statement of understanding reached during the elaboration of the 1997 Watercourses Convention, which read: "In determining 'vital human needs', special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation."

49. His delegation welcomed the expansion of the scope of draft article 14 to cover any State, including a non-aquifer State, that had reasonable grounds for believing that an activity planned in its territory might affect a transboundary aquifer or aquifer system and thereby have a significant adverse effect on another State, including a non-aquifer State. His delegation supported the Commission's decision not to address in the draft articles the issue of compensation in circumstances where harm resulted despite efforts to prevent such harm, since the issue was covered by other rules of international law, including the draft principles of liability and the polluter-pays principle.

50. Under the Malaysian Constitution, legislative powers were divided between the Federal Government and state governments with regard to shared natural resources, particularly land and water. He wondered how the principles set out in the draft articles would apply in such a federal system.

51. **Mr. Panahi Azar** (Islamic Republic of Iran) said that, although there were some similarities between the responsibility of States for internationally wrongful acts and that of international organizations, there were marked differences in the functions and position of international organizations and States. It was therefore important to differentiate the circumstances precluding wrongfulness in the case of acts by States or by international organizations. With regard to draft article 17 ("Consent"), he stressed that validity of consent was dependent on the will of the State or international organization concerned and should not involve any pressure and/or violation of its sovereignty or independence. On principle, every consent should be taken as valid. The limits of consent should also be determined objectively.

52. There were some inconsistencies in the draft articles. For example, draft article 18 ("Self-defence") did not fully reflect paragraphs 15 to 17 of the Special Rapporteur's report (A/CN.4/564). A clear distinction should be drawn between self-defence and the lawful use of force in reasonable implementation of the purposes of a given mission. Furthermore, the draft article appeared to use the term "self-defence" as used in Article 51 of the Charter of the United Nations, even though that Article referred exclusively to States. In other words, the draft article appeared to contain elements of the progressive development of international law, since no one had ever suggested that customary law related in any way to the activities of international organizations. Even an implied reference to Article 51 of the Charter was therefore unnecessary.

53. In draft article 22 ("Necessity"), the terms "essential interest" and "international community" were ambiguous, and the discussion in paragraphs 35 to 42 of the Special Rapporteur's report did not set out any objective definition of either concept.

54. His delegation concurred with the Commission's view, as expressed in draft article 23 ("Compliance with peremptory norms"). Having accepted peremptory norms as obligatory, international organizations should comply with them. With regard to the question posed by the Commission in paragraph 28 (a) of its report as to whether members of an international organization that were not responsible for the internationally wrongful act of that organization had an obligation to provide compensation to the injured party, his delegation believed that member States should try to offer due compensation, taking into account the organization's rules and regulations.

Agenda item 77: Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session (*continued*) (A/C.6/61/L.7 and L.8)

55. **Mr. Bühler** (Austria), introducing the draft resolution on the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session (A/C.6/61/L.7), of which Morocco had become a sponsor, said that the draft resolution was very similar to the one adopted in 2005. After a review of its content, he expressed his confidence that the Committee would adopt it without a vote. The order of paragraphs 8 and 9 should, for the sake of logical argument, be reversed.

56. *Draft resolution A/C.6/61/L.7, as orally revised, was adopted.*

57. **Mr. Ganeson** (Malaysia) introduced the draft resolution on the revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (A/C.6/61/L.8). Adoption of the draft resolution would significantly enhance the operation of the Model Law.

58. *Draft resolution A/C.6/61/L.8 was adopted.*

The meeting rose at 6 p.m.

United Nations

A/C.6/61/SR.16

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Chairman: Mr. Gómez Robledo .... (Mexico)

Contents

Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*)

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The meeting was called to order at 10.10 a.m.

Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*) (A/61/10)

1. **Mr. Hmoud** (Jordan) said that, in the light of the scarcity of international practice, the Commission should take a cautious approach in developing rules on responsibility of international organizations, especially in modelling draft articles on the corresponding articles on responsibility of States for internationally wrongful acts. The draft articles should be formulated in a manner that reflected the distinct character of an international organization. Unlike a State, an international organization was not sovereign, and the aspects of a State's responsibility that were linked to its sovereignty might not carry over to an international organization.

2. Under chapter V on circumstances precluding wrongfulness, draft article 17 concerned consent. The issue of valid consent by an international organization was complex, especially when the organization had organs with overlapping functions, as was the case with the United Nations. Some of the questions to be answered were which organ or individual had the authority to express consent; could there be implicit consent by the international organizations; and what were the consequences to the international organization when two or more of its organs held conflicting positions towards the act. Draft article 18 concerned self-defence, which was an inherent right of the State emanating from its sovereignty. A State exercised self-defence against armed attack to protect its territorial integrity and political independence. That was not the case with an international organization, which had no sovereignty over territory. The examples provided in the commentary were in fact not examples of the self-defence doctrine. Defence of a mission was a mandate, not an inherent right, and the defence of life or property under a specific mandate was subject to different conditions than self-defence under international law. If the intention was to preclude the wrongfulness of an act of defence carried out in the context of a mandate, the draft article should be reformulated accordingly.

3. On the other hand, his delegation considered it appropriate to include force majeure (draft article 20) and distress (draft article 21) among the circumstances precluding wrongfulness for an international organization. There were examples of international practice concerning force majeure, and, despite the lack of international practice, distress could also be contemplated as a circumstance precluding wrongfulness. Similarly, there was no reason not to include necessity (draft article 22) in that category, even though the example provided in the commentary related to a breach of an obligation towards an employee of the organization rather than a breach of an international obligation. However, his delegation would welcome clarification from the Commission concerning the meaning of the phrase "an essential interest of the international community as a whole" in paragraph 1 (a).

4. Under the chapter on responsibility of a State in connection with the act of an international organization, his delegation viewed aid or assistance by a State in the commission of an internationally wrongful act by an international organization (draft article 25) as grounds to trigger that State's responsibility. However, the commentary did not elaborate on the form or threshold of such aid or assistance that would give rise to the State's responsibility, which was crucial to understanding the impact of the draft articles, particularly in relation to member States. It was not clear, for instance, whether a financial contribution to the annual budget of the organization would constitute aid or assistance in the commission of the wrongful act, or whether it would make a difference if such a contribution financed the act directly or indirectly. Further elaboration was also needed as to the extent of direction and control (draft article 26) that would trigger the responsibility of a member State. The constituent instrument and rules of the organization would help in determining whether a State or States had direction and control over a wrongful act, but other indicators should also be examined. Coercion (draft article 27), if exercised by a State member of an international organization, could also be characterized as direction and control over the wrongful act committed by the organization.

5. His delegation supported draft article 28 on international responsibility in case of provision of competence to an international organization. A State should not be able to rely on transferring competence to an international organization in relation to an international obligation to relieve itself of responsibility. Such immunity might create a gap if the act was not wrongful for the international organization itself. With regard to draft article 29 on responsibility of a State

member of an international organization for the internationally wrongful act of that organization, it should be borne in mind that the State and the international organization were entities with separate legal personalities. As a consequence, membership in the organization did not per se trigger international responsibility. However, the constituent instrument and the rules of the organization would play an important role in determining whether membership would result in responsibility for a wrongful act of the organization. Joint management by all member States would necessarily result in responsibility to varying extents, whether on the grounds of direction and control (draft article 26) or the grounds of acceptance (draft article 29, paragraph 1 (a)). The question of compensation to an injured party, should the international organization not be in a position to provide it, would again depend on whether member States had assumed responsibility for the acts of the organization under the constituent instrument and the rules of the organization. Member States would also be jointly responsible to provide compensation if the injured party relied on such responsibility. Lastly, his delegation saw no reason why States should not be under an obligation to cooperate to bring to an end a breach of the international organization of an obligation under a peremptory norm of international law.

6. **Mr. Vijayan** (India) said that the work of the Commission on shared natural resources was important, since it was an area in which international practice was still evolving. In particular, considerable growth in practice and scientific knowledge concerning transboundary aquifers had taken place in recent years. His delegation therefore welcomed the Commission's view that it was still premature to reach a conclusion on the final form the draft articles on the law of transboundary aquifers should take. It also supported the inclusion in draft article 3 of an express affirmation of the principle of the aquifer State's sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory. Draft articles 4 and 5 needed to be considered together for an understanding of the principle of equitable and reasonable utilization. The phrase "accrual of benefits" in draft article 4, subparagraph (a), required clarification, since the titles of draft articles 4 and 5 both referred to "utilization".

7. In draft article 11, his delegation supported the use of the term "precautionary approach". However, the principle needed to be more clearly stated, and the clause beginning "in view of uncertainty ..." should be deleted as unsuitable for inclusion in a legal text. Although draft article 16 dealt with the obligations of States in responding to actual emergency situations, the commentary recognized that there was a lack of adequate knowledge concerning the types and extent of emergencies that might occur or the response actions that might be taken. India supported the general obligation to cooperate set out in the draft articles. However, there appeared to be some overlap, as the obligation to cooperate was alluded to in various ways in draft articles 4, 7, 13 and 19. The interrelationship among the various mechanisms of cooperation needed to be more clearly defined.

8. With regard to the draft articles on responsibility of international organizations, his delegation had in the past sounded a note of caution about assuming that the circumstances precluding wrongfulness applicable to States were equally applicable to international organizations. The attributes of a State and an international organization were not the same. Moreover, given the diversity of international organizations and the differences in their objectives and functions, it would be difficult to assess which circumstances precluding wrongfulness applicable to States were applicable to international organizations, especially given the absence of definitive practice in that area. Draft article 18 on self-defence was a good example; self-defence, by its nature, was applicable only to the actions of a State. Moreover, it could be questioned whether the international obligations usually incumbent on international organizations were such that they could reasonably lead to a breach of a peremptory norm of general international law.

9. In the same vein, his delegation was not sure whether the concept of necessity (draft article 22) should be extended to international organizations. States were entitled to invoke necessity to safeguard their essential interests, but in the absence of specific practice it was difficult to envisage under what circumstances the same right should be extended to international organizations. The application of the concept to peacekeeping missions also raised difficulties, as such missions followed very clear rules of engagement. His delegation would therefore prefer to see the draft article deleted, so that it could not be invoked as a pretext for non-compliance with international obligations or for infringement of the rights of any third State.

10. **Ms. Pino Rivero** (Cuba) noted that the consultation with experts in the field of hydrogeology had resulted in draft articles on the law of transboundary aquifers that were in keeping with the depth and seriousness that the topic required. The draft articles should help States to utilize the aquifers in their territory, over which they had sovereign control, and to cooperate in protecting and using them properly. It was of vital importance that that principle should be expressly stated in the draft articles, since water was a natural resource vital to the existence of humankind. Its scarcity had become a global problem, and indiscriminate use, lack of protection and pollution could lead to a future crisis in international relations.

11. Whereas draft articles 4 and 5 stipulated that utilization of aquifers must be "equitable and reasonable", environmental law had increasingly adopted the term "sustainable", as for example in the Convention on Biological Diversity, which had a bearing on the draft articles in that an aquifer was part of an ecosystem. Her delegation therefore suggested that the term "sustainable" should be used in place of "reasonable". In draft article 6, the word "*prevenir*" in the Spanish version should be changed to "*evitar*" wherever it appeared in order to render the concept of "prevent" more accurately. Furthermore, the article should incorporate the polluter-pays principle and set forth a rule on compensation by the State causing the harm. In addition, the Commission should clarify the meaning of the term "significant adverse effect" in draft article 14 and the term "serious harm" in draft article 16, so that interpretation was not left to individual States when they applied the articles.

12. Concerning the draft articles on responsibility of international organizations, her delegation generally supported the approach of taking as a model the articles on responsibility of States for internationally wrongful acts. However, in view of the differences in structure and interests between States and international organizations, not all aspects of the articles on responsibility of States could be transposed to the current text. It would require further thought, for example, to determine when and how an international organization might invoke self-defence (draft article 18) as a circumstance precluding wrongfulness, since self-defence was not part of the function and practice of international organizations. Her delegation agreed that an international organization could invoke necessity (draft article 22) as a circumstance precluding responsibility for a wrongful act, though only if the wrongful act was the only way to safeguard an essential interest of the organization against a grave and imminent peril. However, the formulation must be properly balanced in order to prevent indiscriminate use of the concept to justify wrongful acts.

13. In response to the question whether members of an international organization that were not responsible for an internationally wrongful act of that organization had an obligation to provide compensation to the injured party should the organization not be in a position to do so (A/61/10, para. 28 (a)), her delegation considered that an international organization and a State each possessed a different and independent legal personality. The international organization must be held primarily responsible for providing compensation to the injured party, and responsibility should not fall on a member State that had had no part in the act or the decision leading to the act that had caused the harm. The international organization should seek an alternative way when not in a position to provide compensation, but the solution should definitely not be that the member States should assume responsibility.

14. **Mr. Paasivirta** (Observer for the European Commission), speaking on behalf of the European Community on responsibility of international organizations, said that the commentary to draft article 17 on consent mentioned the example of consent by a State to the verification of the electoral process. In addition to the European Union's civil crisis instruments, there was considerable European Community practice in the field of election observation. Under two regulations of 1999 the Community provided support for electoral processes by supporting independent electoral commissions, providing material, technical and legal assistance in preparing for elections, including electoral censuses, taking measures to promote the participation of specific groups, particularly women, and training observers. Community election observation missions were usually led by a member of the European Parliament upon the invitation of the host Government.

15. With regard to the draft articles on responsibility of a State in connection with the act of an international organization, draft articles 25 to 27 and 30 did not call for particular comment, except to warn that such direct borrowing from the articles on responsibility of States deserved close scrutiny. However, the new draft articles 28 and 29, which were without precedent,

caused particular problems for the European Community in the light of the Community's special character. Draft article 28 put forward the new idea that a State member of an international organization might be held responsible for bestowing competence on it; as currently drafted, the article implied that a State could be liable for the mere fact of transferring competence to an international organization, even if the organization acted lawfully, if the State thereby circumvented one of its international obligations. From the European Community's standpoint the approach was difficult to understand. He would also recall the criticism expressed by the Commission during the previous session with respect to the concept of circumvention as used in draft article 15.

16. The example given by the Special Rapporteur in his report (A/CN.4/564/Add.1, para. 68) — States bound by the Treaty on the Non-Proliferation of Nuclear Weapons which could be held responsible if they established an international organization that acquired or developed nuclear weapons — seemed far-fetched. However, the more relevant examples cited in the commentary concerning the jurisprudence of the European Court of Human Rights did not support the broad language of the draft article. While the Court had emphasized that States parties to the European Convention on Human Rights could not evade their obligations by transferring powers to an international organization not a party to the Convention, it had also underlined that State responsibility for an act of that organization did not arise where the organization offered a level of protection of human rights equivalent to that to which member States were held by the Convention. That criterion of equivalence between the formal obligations of the member States and the obligations inherently respected by the organization was missing from draft article 28. As the term "circumvents" did not require a specific intention to evade obligations, the draft appeared to be over-inclusive. At the very least, in order for the article to be acceptable to the European Community, it would have to be clarified that there was no circumvention if the State transferred powers to an international organization which was not bound by the State's own treaty obligations but whose legal system offered a comparable level of guarantees.

17. Draft article 29 also raised questions. Although the European Community might be able ultimately to accept the principle that the responsibility of a State member of an international organization for the internationally wrongful act of that organization could be presumed to be at best subsidiary, the conditions set forth in paragraph 1 were potentially very far-reaching. Under paragraph 1 (a) a State was responsible if it had accepted responsibility for a particular act. In some international organizations, such as the European Community, such explicit acceptance of responsibility was severely curtained by the constitutional law of the organization. Under paragraph 1 (b), a State was responsible if it had led the injured party to rely on its responsibility. That principle could be problematic with regard to mixed agreements of the European Community and its member States with third States, in which the Community and its member States were parties "of the one part" and the third State was the party "of the other part"; it might be held that the third State had thus been led to believe that the member States were responsible under international law for the implementation of the whole agreement, even though large parts of it might fall within exclusive Community competence. While the Community could seek its own solutions to such complications, it did not find the wording of draft article 29 helpful.

18. **Mr. Pambou-Tchivounda** (Chairman of the International Law Commission), introducing chapter VIII, on reservations to treaties, said that the Commission had adopted five draft guidelines on the validity of reservations and had reconsidered two previously adopted draft guidelines in the light of the new terminology on which it had decided at its fifty-eighth session. It had also debated the second part of the Special Rapporteur's tenth report (A/CN.4/558/Add.1 and Corr.1 and Add.2) and had referred 16 draft guidelines to the Drafting Committee.

19. The five draft guidelines adopted by the Commission were set out in the third part of the Guide to Practice and covered the validity of reservations and interpretative declarations. After a lengthy debate, the Commission had opted for the terms "validity" and "invalidity" of reservations instead of permissibility (*licéité*) and impermissibility (*illicéité*), since most of the members of the Commission had been of the opinion that "validity" was more neutral and did not prejudge the doctrinal controversy between proponents of the notion of "permissibility" and supporters of the term "opposability". The term "permissibility" had been retained in the English text to denote the substantive validity of reservations fulfilling the

requirements of article 19 of the Vienna Conventions. That term was rendered in French by the expression "*validité substantielle*".

20. The third part of the Guide to Practice dealt successively with the permissibility of reservations, competence to assess the validity of reservations and the consequences of the invalidity of a reservation.

21. Draft guideline 3.1 faithfully reproduced the wording of article 19 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which was itself patterned on the corresponding provision of the 1969 Vienna Convention on the Law of Treaties, with just two additions, which had been needed in order to cover treaties concluded by international organizations. The draft guideline was concerned with the power to make reservations and the cases in which that power was limited. As the principle of freedom to formulate reservations could not be separated from the exceptions to the principle, the Commission, which generally avoided modifying the wording of the provisions of the Vienna Conventions that it had carried over into the Guide to Practice, had decided against elaborating a separate draft guideline dealing only with the principle of the presumption of the validity of reservations. In draft guideline 3.1, it had therefore retained a reference to the different moments when a reservation might be formulated, even though such a reference was superfluous since it was to be found in the actual definition of reservations.

22. The validity of reservations depended not only on the substantive conditions set forth in article 19 of the Vienna Conventions, but also on compliance with conditions of form and timeliness. As the latter had been dealt with in the second part of the Guide to Practice, the third part placed greater emphasis on substantive validity.

23. Draft guideline 3.1.1 listed cases where reservations were expressly prohibited and was intended to clarify the scope of draft guideline 3.1, subparagraph (a), which did not indicate what was meant by "reservation prohibited by the treaty". The prohibition could be clear and precise or more ambiguous. More often the prohibition was partial and related to one or more specified reservations or to one or more categories of reservations. In more complicated situations, the treaty did not prohibit reservations, but excluded certain categories of them. Article 19, subparagraph (a), of the Vienna Conventions covered all three situations.

24. The purpose of draft guideline 3.1.2 was to clarify the meaning of the expression "specified reservations", which had not been defined in the Vienna Conventions, even though it could have important consequences for the applicable legal regime, because reservations which were not "specified" must pass the test of compatibility with the object and purpose of the treaty. In practice, some reservation clauses authorized reservations to particular provisions which were expressly and restrictively listed either affirmatively or negatively, others authorized specified categories of reservations and a very few authorized reservations in general.

25. A general authorization of reservations did not necessarily resolve all the problems, because it left unanswered the two questions of whether the other Parties might still raise objections and whether the authorized reservations were subject to the test of compatibility with the object and purpose of the treaty.

26. Most Commission members had held that a reservation should be considered to be specified if a reservation clause indicated the provisions of a treaty to which a reservation could be entered, or if it stated that reservations were possible to the treaty as a whole in respect of certain specific aspects.

27. Draft guideline 3.1.3 made explicit what the Vienna Conventions had left implicit, namely that every reservation must satisfy the basic condition set forth in article 19, subparagraph (c), of not being incompatible with the object and purpose of the treaty. That principle was one of the fundamental elements of the flexible system established by the Vienna regime. While there was, however, no doubt that that requirement represented a rule of customary law, its content remained vague and there was some uncertainty as to the consequences of incompatibility. That draft guideline made it clear that reservations which were "implicitly authorized", because they were not formally excluded by the treaty, must be compatible with the object and purpose of the treaty.

28. Draft guideline 3.1.4 explained that, when the treaty did not define the content of specified reservations, they were still subject to the compatibility test. Of course, *a contrario*, when the content of a specified reservation was indicated in the reservation

clause, a reservation consistent with that provision was not subject to the compatibility criterion.

29. Draft guidelines 1.6 and 2.1.8 had been modified to bring them into line with the new terminology adopted by the Commission. Lastly, he drew attention to the fact that the Commission would appreciate receiving Governments' views on the adjustments they deemed necessary, or useful, to introduce in the preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties adopted by the Commission at its forty-ninth session, as it intended to hold a meeting with United Nations human rights experts at its fifty-ninth session.

30. Introducing chapter IX of the report, on unilateral acts of States, he said that, at its fifty-eighth session, the Commission had had before it the Special Rapporteur's ninth report (A/CN.4/569 and Add.1), and it had decided to re-establish the open-ended Working Group under the chairmanship of Mr. Alain Pellet. It had requested the Working Group to prepare the Commission's conclusions on the topic of unilateral acts of States, taking into consideration the various views expressed, the draft Guiding Principles drawn up by the Special Rapporteur and its previous work on the topic. After examining the Working Group's report, the Commission had adopted a set of 10 Guiding Principles applicable to unilateral declarations of States which were capable of creating legal obligations and it had commended the Guiding Principles to the attention of the General Assembly.

31. The Commission had adopted the Guiding Principles in the belief that it was important for States to be in a position to judge with reasonable certainty whether and to what extent their unilateral conduct might legally bind them on the international plane. The Commission was aware that the concept of a unilateral act was not uniform and could encompass a very wide spectrum of conduct. It had accorded priority to the study of formal declarations embodying an express manifestation of the will of the author State to be legally bound. The Commission realized, however, that States could enter into a commitment by engaging in unilateral behaviour other than making a formal declaration.

32. The definition of unilateral acts *stricto sensu* contained in Guiding Principle 1 rested on two criteria: the public nature of the declaration and the manifestation of the author's will to be legally bound. The binding character of such declarations was based on good faith. Guiding Principle 1 was well illustrated in international practice and was likewise predicated on the case law of the International Court of Justice, which also recognized the decisive role played by the intention of the State in question.

33. Guiding Principle 2 merely asserted that any State possessed the capacity to undertake legal obligations through unilateral declarations. Guiding Principle 3 was prompted by the judgments of the International Court of Justice. It listed the factors which must be taken into account in order to determine the legal effects of such declarations. Many examples drawn from international practice illustrated the pertinence of those factors.

34. Guiding Principle 4 concerned the capacity of a State authority to commit the State through an international declaration. It was clear from State practice and the jurisprudence of the International Court of Justice that that power was indisputably held by heads of State, heads of Government and ministers for foreign affairs. In its most recent judgments, the International Court of Justice had, however, acknowledged that other persons might be authorized by a State to bind it legally in matters falling within their purview.

35. Turning to Guiding Principle 5, he noted that, on several occasions, the International Court of Justice had held that the question of form was not decisive, a finding which was supported by State practice. In the *Nuclear Tests* cases, the International Court of Justice had taken the view that even a series of declarations which, in isolation, would not have bound the State could, together, constitute a legal commitment.

36. As for Guiding Principle 6, State practice supplied several examples of unilateral declarations made in a purely bilateral context and others of declarations addressed to a limited group of States or to the international community in its entirety. In the latter case, such declarations contained *erga omnes* undertakings.

37. The tenor of Guiding Principle 7 was in keeping with the judgments of the International Court of Justice and with article 31 of the 1969 Vienna Convention on the Law of Treaties, which applied to unilateral declarations by analogy.

38. As far as Guiding Principle 8 was concerned, most of the members of the Commission had considered that it was appropriate to apply the principle set forth in article 53 of the 1969 Vienna Convention on the Law of Treaties to unilateral declarations. In its Judgment in the *Armed Activities on the Territory of the Congo* case, the International Court of Justice had not excluded the possibility that a unilateral declaration made by a State could be invalid.

39. Guiding Principle 9 simply applied to unilateral declarations a well-established principle of international law which had been laid down in article 34 of the 1969 Vienna Convention on the Law of Treaties. Moreover, a unilateral declaration which aimed to impose obligations on other States, or to limit their rights, even if it was not accepted in the strict meaning of the term, could prompt analogous declarations and thus constitute the starting point of a rapid process of development of customary law, one example being the 1945 Truman Proclamation on the American continental shelf.

40. In the context of Guiding Principle 10, the fundamental change in circumstances referred to in subparagraph (c) had to be understood within the strict limits of the customary rule enshrined in article 62 of the 1969 Vienna Convention on the Law of Treaties.

41. In closing, he drew attention to the contents of paragraphs 171 and 172 of the Commission's report.

42. **Ms. Hammarskjöld** (Sweden), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the question of reservations incompatible with the object and purpose of a treaty was the most important aspect of the topic of reservations to treaties. She could understand why the Special Rapporteur believed that a Guide to Practice must necessarily contain a definition of the object and purpose of a treaty. However, the result of including such a definition might merely be to replace one elusive concept by another, or to introduce cumbersome criteria that might disturb established terminology used in the Vienna Convention on the Law of Treaties. The two alternative texts of draft article 3.1.5 carried a risk of confusing rather than clarifying the matter.

43. The eleventh report of the Special Rapporteur was expected to comment on the consequences of a reservation found to be incompatible with the object and purpose of a treaty. A growing number of States, including her own, were developing the practice of severing such a reservation from treaty relations between the countries concerned. Since ratification of a treaty expressed the consent of the ratifying State to be bound by its rules, a State that nullified key provisions of a treaty by means of a reservation should not be permitted to accede to it.

44. Article 19 of the Vienna Convention made clear that reservations incompatible with the object and purpose of a treaty should not be part of treaty relations between States. An invalid reservation should therefore be considered null and void. Since an objection to an invalid reservation served to draw attention to its nullity, the Nordic countries supported the intermediate solution suggested by the Special Rapporteur in draft guideline 2.1.8.

45. The practice of severing reservations incompatible with the object and purpose of a treaty was fully in conformity with article 19 of the Vienna Convention, which made clear that such reservations were not to form part of the treaty relationship. If, instead of objecting to impermissible reservations, States could exclude bilateral treaty relations with the reserving State, the option of separating out such reservations would serve to keep the treaty relationship in being and would preserve the possibility of dialogue within the treaty regime. However, in so doing account must be taken of the intention of the reserving State regarding the relationship between the ratification of a treaty and the reservation.

46. The Nordic countries welcomed the proposal for a meeting between the Commission and human rights experts, including representatives of treaty monitoring bodies, to discuss issues relating to reservations to human rights treaties. A similar conference had been held in 2002 at the Raoul Wallenberg Institute for Human Rights and Humanitarian Law in Lund, Sweden, attended by several representatives of treaty bodies, and the proceedings had been reproduced in a book. In the view of the Nordic countries, great care should be exercised when deciding whether to allow the development of a separate regime for dealing with the specific effects of invalid reservations to human rights treaties. The preliminary conclusions presented by the Special Rapporteur in 1997 (A/52/10, para. 157) should not be allowed to result in unwarranted effects in that regard. As for paragraph 10 of the conclusions, if the option of severability was available there might be no need for the reserving State to modify or

withdraw its reservation, or to forgo becoming a party to the treaty.

47. **Mr. Alday** (Mexico) said that the reports on reservations to treaties prepared by the Special Rapporteur gave a clear and objective picture of the problems surrounding application of the existing treaty and customary rules on the subject. His delegation's view was that, in judging the validity of a reservation, its compatibility with the object and purpose of the treaty was a fundamental criterion, not a secondary one. He agreed with the Special Rapporteur that the definition of "object and purpose" must be broad enough to permit the application of that criterion on a case-by-case basis, and in conformity with the rules of treaty interpretation. Even so, it was not a straightforward process, and it was important to have a defining clause in treaties, for the sake of identifying the rights and obligations of the parties. His delegation was therefore satisfied with the first draft of guideline 3.1.5 proposed by the Special Rapporteur.

48. **Mr. Hafner** (Austria) said that the issue of reservations to human rights treaties was of such significance that a meeting between the Commission and United Nations human rights experts, including representatives of treaty-monitoring bodies, would be extremely helpful. The meeting could also discuss possible adjustments to the 1997 preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties. Before any adjustments were made to the substance of those conclusions, it would, however, be wise to wait for the outcome of the discussion of the current draft guidelines, since the two texts were interrelated.

49. Although the term "specified reservations" could be found in article 19 of the 1969 Vienna Convention on the Law of Treaties, and its origin could be traced back to the words "specific reservations" employed by Fitzmaurice and Waldock in their early drafts of articles for the Convention, it was questionable whether those epithets really had the same meaning. In any case, the adjective "specified" clearly posed some problems in the subsequent draft guidelines, as draft guideline 3.1.3 referred to "certain reservations", although the commentary did not explain whether that expression also covered "specified reservations".

50. Even though the object and purpose of a treaty was indeed central to the reservation regime, draft guideline 3.1.4 raised some questions. While he noted the Commission's opinion, as set out in paragraph (13) of the commentary to draft guideline 3.1.2, namely that a reservation was specified if a reservation clause indicated the treaty provisions in respect of which a reservation was possible, he wondered why reservations made under such conditions still had to pass the object-and-purpose test. Surely a reservation clause indicating precisely to which treaty provisions a reservation could be made already implied that those provisions did not affect the object and purpose of the treaty. It was a different matter if the reservation was not prohibited under article 19, paragraph (b) of the 1969 Vienna Convention on the Law of Treaties, or if it was explicitly envisaged. In the former case, the passing of the compatibility test was necessary, in the latter case it was not.

51. The underlying concept of draft guidelines 3.1 to 3.3.2 corresponded to Austrian practice, which was predicated on the principle that invalid reservations were null and void. The different categories of reservations prohibited in article 19 of the Vienna Convention all had the same legal consequences. The draft guidelines on the status and competence of monitoring bodies were inconsistent. According to draft guideline 3.2.1, the competence of existing monitoring bodies to monitor the application of the treaty encompassed the competence to assess the validity of reservations, yet draft guideline 3.2.2 called on States to provide those bodies with that competence.

52. Draft guideline 3.2.3 raised the question whether that competence should cover all reservations. If a treaty provided for specified reservations and hence there were no doubts concerning their permissibility, should a State making such a reservation also be obliged to consult with the monitoring body? Such a procedure would not be very attractive to States.

53. He took it that draft guideline 3.3.2 did not exclude the possibility of inter se agreements, provided that they were compatible with the basic treaty. If a State made a reservation to a treaty which precluded all reservations and another State party accepted that reservation, why should that agreement not be regarded as an inter se agreement in conformity with article 41 of the Vienna Convention? Even if a treaty prohibited all reservations, that did not necessarily mean that all the treaty provisions served the effective realization of the object and purpose of the treaty as a whole.

54. Draft guideline 3.3.4 gave rise to grave concerns, because it even invited States to make reservations prohibited by a treaty. It was questionable whether that result was really intended. Furthermore, no deadline was set for the entering of objections, yet such a time limit would be vital in practice. The draft guidelines said nothing about the effect of silence. The conclusion that silence could not be equated with the acceptance of the reservation would be in accordance with draft guideline 3.3.3, according to which nullity could not be remedied by unilateral acceptance. It was, however, doubtful whether anything like a collective position of the States parties to general multilateral treaties could be said to exist, especially as the draft guidelines did not establish the time by which such position had to be established.

55. **Mr. Lammers** (Netherlands), commenting on the definition of the "object and purpose" of a treaty, said that his delegation had considered the two alternative texts suggested by the Special Rapporteur but doubted whether they would achieve the end he had in view. He urged caution in dealing with the idea that the notion of "object and purpose" could be defined at all, since the words already referred to the core obligation or *raison d'être* of a particular legal instrument. The notion of "the general architecture of the treaty", as suggested by the Special Rapporteur, seemed to refer to the structure or framework of a treaty, introducing a notion alien to the law of treaties proper and shifting the focus away from the substantive issues indicated by "object and purpose". States might interpret the words in different ways for a given treaty, just as they might have different reasons for wanting to become parties to it. Moreover, the phrase "object and purpose" was not unique to the subject of reservations. It appeared many times in the Vienna Convention on the Law of Treaties, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, and the Vienna Convention on Succession of States in respect of Treaties. It was also frequently used in case law and in dispute settlement procedures. Thus a definition of "object and purpose" should not take place in a vacuum, because it could have an impact in other situations and produce unexpected legal effects. His delegation would discourage the Commission from undertaking such a definition and would suggest that the efforts to arrive at one should be brought to an end. There was already a general sense of what the notion meant, and his own delegation had no objection to the earlier text presented by the Special Rapporteur.

56. Concerning reservations to normative multilateral treaties, including human rights treaties, and the preliminary conclusions on that subject (A/52/10, para. 157), he noted that, according to paragraph 2 of those conclusions, the flexibility of the law on reservations provided a "satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty". The preliminary conclusions then stated that the same was true of human rights instruments. Everyday treaty practice did not, however, achieve a "satisfactory" balance in that sense. Many would agree that the law on reservations seemed to favour participation at the expense of the integrity of the treaty. As for the role of the treaty-monitoring bodies with respect to reservations to human rights instruments, the conclusions were largely descriptive of the situation as it had been in 1997 and continued to be. The monitoring bodies certainly had the authority to address the issue of reservations in their discussions with States parties and to state whether they considered a particular reservation to be contrary to the object and purpose of the treaty. Their role was distinct from that of the States parties, which could react to reservations by submitting objections and by deciding, if necessary, that no treaty relationship would be established with the reserving State.

57. It would be desirable to review the preliminary conclusions to include a clearer statement of the intended meaning of the "legal force" of the findings of the monitoring bodies, mentioned in paragraph 8. The present text limited the legal force of those findings to the scope of the powers given to the monitoring bodies in their constituent instruments, thus ignoring their role in interpreting those instruments. His delegation believed that the views expressed by monitoring bodies could contribute to the development of legal opinion. If those bodies consistently expressed a particular view on the interpretation of a certain category of reservations, that view could become an authoritative interpretation. He challenged the Special Rapporteur to take his thinking one step further and attempt to describe what the "legal force" in that context could be. The legal effects of the work of the monitoring bodies, and a proper analysis of current practice, should be reflected in the future Guide to Practice on the topic of reservations. His delegation was concerned

that the Commission's work on the topic so far had focused on a description of the system and its theoretical intricacies, instead of providing tools for legal practitioners. It strongly supported the proposal that, during its fifty-ninth session, the Commission should hold a seminar on reservations to human rights treaties, with the participation of all the monitoring bodies of the human rights treaties.

58. **Ms. Harrington** (Canada) agreed with the view expressed by the Special Rapporteur in his previous reports on the topic that the question of reservations to human rights treaties represented an ambiguity or gap within the Vienna system of treaties as a whole. She also welcomed confirmation that the ability of a human rights treaty body to pronounce on the validity of a reservation did not extend the competence of that body beyond the scope provided in its constituent instrument. A human rights treaty body could not make binding pronouncements on reservations, or act as the sole judge of their validity. However, the terms "rule" or "ruling" should not be used in connection with the view of such a body on the validity of a reservation, which should preferably be described as an "assessment" or a "pronouncement".

59. The express retention of a role for contracting parties to a treaty to respond by means of objections to the invalidity of a reservation entered by another contracting party was gratifying. It would, however, be useful to spell out the consequences arising from a reservation that was null and void because it did not fulfil the conditions for validity in article 19 of the Vienna Convention on the Law of Treaties.

60. Her delegation urged caution about proposing a role for the depositary of a treaty in reviewing manifestly invalid reservation. Because of the difficulty in determining the true object and purpose of a treaty, such a role could cause further uncertainty.

61. Turning to the topic of unilateral acts of States, she welcomed the Guiding Principles as a helpful resource for States and a reliable summation of the international jurisprudence on the topic. She agreed with the Commission that there was no uniform concept of a unilateral act. It was therefore wise to restrict the Guiding Principles to formal unilateral declarations intended to produce obligations under international law. The Commission's focus on intention within the definition of a unilateral act was appropriate, as was the preambular confirmation that States might "find themselves bound by their unilateral behaviour on the international plane". She also noted that the Commission had expressly excluded reservations from the scope of the Guiding Principles and had endorsed the restrictive approach to the interpretation of obligations which might arise from unilateral acts. The question of capacity to make unilateral declarations on behalf of a State remained unsettled. Her delegation would welcome further discussion as to whether the same principles should apply to declarations addressed to specific States as to those addressed to the international community as a whole.

62. In the difficult topic of unilateral acts, there was a possibility of overlap between two sets of principles applying, respectively, to the framing of obligations by treaty and through declarations. The Guiding Principles should produce greater certainty as to the obligations arising from unilateral acts.

63. **Mr. Ma** Xinmin (China), commenting on the competence of treaty monitoring bodies to rule on the validity of reservations, said that the function attributed to them in that respect in the draft guidelines exceeded their normal function of assessment and went beyond the relevant provisions of the Convention on the Law of Treaties and State practice. The acceptance or otherwise of a reservation by contracting parties to a treaty had a substantive impact on the effect of the reservation. Treaty bodies, on the other hand, were concerned, not with the readjustment of the treaty relationship, but rather with the implementation of the treaty on the basis of the existing treaty relationship. Treaty monitoring bodies should not have competence to rule on the validity of reservations. He therefore proposed the deletion of the third subparagraph of draft guideline 3.2 and of draft guidelines 3.2.1, 3.2.2 and 3.2.3 in their entirety.

64. Draft guideline 3.2.4 provided that a ruling by a treaty-monitoring body neither excluded nor affected rulings by other contracting parties and dispute-settlement bodies. However, different entities with competence to rule might assess the same reservation differently. The conclusion contained in draft guideline 3.2.4 was over-subjective and did not help to resolve practical problems. Likewise, draft guidelines 3.3 to 3.3.4 were not fully thought out and required further discussion. No provision should be made, such as in draft guideline 2.1.7, for the treaty depositary to draw the attention of parties to the legal issues raised by a

reservation, because that would go beyond the procedural function of the depositary.

65. Concerning the provisions in draft guidelines 3.3.2 and 3.3.3, the pertinent question was not the validity or otherwise of a reservation, but whether a reservation could be made or not. Other contracting parties were free to decide whether to accept a reservation. If some contracting parties chose to accept and others to object to a reservation, it was difficult to conclude that the reservation was invalid from the outset.

66. Turning to the definition offered by the Special Rapporteur of the "object and purpose" of a treaty, he said further clarification was needed of the relationship between reservations, the *raison d'être* and essential provisions of a treaty, and its object and purpose.

67. The Commission should, he suggested, consider using different terms for the formulation of reservations and their validity. Using the terms "valid" and "validity" in both contexts confused the two issues. Whether or not a reservation could be formulated did not automatically raise the question of the validity of the reservation itself.

68. He congratulated the Commission on completing its consideration of the topic of unilateral acts of States. The Guiding Principles applied only to unilateral acts of States on the basis of the States' subjective intention to assume international obligations. They did not extend to unilateral declarations made under international law or to unilateral acts intended to create rights under international law. Their adoption did however contribute to the development of international law by clarifying the acts of States which could result in international obligations, thus improving the stability and predictability of international relations.

69. **Mr. Roelants de Stappers** (Belgium) said that the 1997 preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, were generally acceptable. When dealing with such treaties there was no reason to depart from the rules of the Vienna Convention on the Law of Treaties, which included a codification of the law on reservations, thereby obviating the need for *lex specialis*.

70. He endorsed paragraph 3 of the preliminary conclusions and reiterated the position of his delegation, expressed in the Committee in 2004 and 2005, concerning the invalidity of reservations contrary to the object and purpose of a treaty. His delegation also accepted paragraph 5 of the preliminary conclusions, on the understanding that that paragraph — on the competence of a treaty-monitoring body to comment upon and express recommendations with regard to the admissibility of reservations — had to be taken in conjunction with the other paragraphs of the text, and without prejudice to acceptance or rejection of reservations by States parties to a treaty.

71. **Ms. Escobar Hernández** (Spain) noted with satisfaction that in the draft guidelines on reservations to treaties the Commission had opted for the term "validity" rather than admissibility or opposability, a choice for which her delegation had expressed a preference at the past two sessions of the General Assembly. In the Spanish version of draft guideline 3.1, the term "*validez*" was qualified by the adjective "*material*", which helped to delimit the meaning of the term and distinguish it from any interpretation relating to the effects of the reservation. Her delegation endorsed the general thrust of draft guidelines 3.1.1 to 3.1.4, and especially the role of the object and purpose of the treaty as a yardstick for the validity of a reservation not expressly authorized by the terms of the treaty. However, draft guideline 3.1.1 referred to reservations "expressly prohibited" by a treaty, which left open the question of those implicitly prohibited.

72. Draft guideline 2.1.8 (Procedure in case of manifestly invalid reservations), introduced an element of progressive development which warranted careful examination, since it was relevant to the definition of the status of the depositary.

73. With regard to the "object and purpose" of treaties, she believed that a guide to practice on reservations must necessarily include a definition. She preferred the first of the options set out in the note by the Special Rapporteur on draft guideline 3.1.5 (A/CN.4/572).

74. It did not seem logical that a monitoring body established for a specific treaty should lack all competence to decide on the validity of reservations to that treaty, and therefore the general intent of draft guidelines 3.2.1 to 3.2.4 merited support. However, the relationship between draft guidelines 3.2 and 3.2.4 should be further developed, because the effect of the provision in the latter did not solve the problem of

what to do in the event of contradictory findings by different bodies on the validity of the same reservation. That problem should be discussed within the framework of the meeting to be held during the Commission's fifty-ninth session with representatives of human rights treaty bodies.

75. Turning to the topic of unilateral acts of States, she welcomed the Guiding Principles and endorsed the approach taken with respect to the definition of unilateral acts, the conditions under which they could take legal effect and the representatives of a State who had capacity to bind the State through their declarations. However, some provisions in the Guiding Principles drew an undesirable parallel with treaties. She also had doubts about the use of the term "void" (*nulo*) in connection with unilateral acts.

76. **Ms. Galvão Teles** (Portugal) observed that some of the proposals and solutions put forward by the Special Rapporteur in his work on reservations to treaties were too far advanced in relation to actual practice and, notwithstanding the enormous value of that work, could imply amendment of the Vienna Conventions.

77. Although the Commission had been initially uncertain whether to use the terms "validity/invalidity" or "permissibility/impermissibility", it had apparently decided, under the clear influence of the Special Rapporteur, to opt for the former. While her delegation understood why the Special Rapporteur might wish to define reservations as valid or invalid, it felt that such qualification was premature and might be too far-reaching. Moreover, it was questionable whether there was anything to be gained by using the terms "validity/invalidity". Practice appeared to indicate that the regime of the Vienna Convention on the Law of Treaties was sufficient in that respect and that emphasis should be placed on the scope of the effects of the reservation and of objections to reservations rather than on the qualification issue.

78. As noted in paragraph 95 of its report, the Commission's work on the subject of reservations to treaties was intended purely as a guide to practice, with a clear understanding that no changes should be made to the relevant provisions of the Vienna Conventions. Moreover, no single direction could be observed in the practice of States. It should be borne in mind that the Vienna Convention on the Law of Treaties was itself silent on the subject, although it included clear provisions on the validity and invalidity of treaties. Also, the institution of reservations had a specific and contractual nature, and the Vienna Conventions conferred a special role on States parties to a treaty to monitor reservations, in the absence of an independent third party. The fact that a State did not object to a reservation did not necessarily mean that it considered the reservation to be valid. Furthermore, if no State objected to a reservation, that did not necessarily mean that the reservation was valid. The converse argument was also true.

79. Silence on the part of States could not be transformed into an implicit system of validation of reservations. On the other hand, her delegation did not see how the supposed intrinsic invalidity of a reservation could prevent States from accepting it or what was the practical effect of preventing such acceptance from changing the nullity of the reservation. The approach taken by the Special Rapporteur seemed to transform the subjective, contractual system provided for in the Vienna Conventions into an objective system. Although her delegation might agree with his proposals *de lege ferenda*, his approach did not seem to be *de lege lata* and thus went beyond what was envisaged in the Vienna Conventions.

80. While her delegation generally agreed with draft guidelines 3.1, 3.1.1, 3.1.2, 3.1.3 and 3.1.4, it felt that certain comments were warranted. Draft guideline 3.1 did not appear to resolve the question of which word should be used to describe the act of presenting a reservation. It was not the term given in article 2 or article 19 of the Vienna Conventions that should characterize the act of presentation but instead the legal regime that governed the presentation. Moreover, States had the "freedom" rather than the "right" to present reservations. The question of the acceptance ("permissibility" or "validity") of the reservation was different.

81. While her delegation agreed with draft guideline 3.1.1, it felt that the drafters of the Vienna Conventions had envisaged much simpler reasoning and purpose. When States, in a given convention, stipulated that all, some or a certain category of reservations were prohibited, they were not creating an inconsistency with respect to article 19 of the Vienna Conventions or the purpose of the treaty. In so stipulating, States identified those reservations as being contrary to the purpose of the treaty. Moreover, what constituted a

"certain category" of reservations should be determined under the rules of articles 31 et seq. of the Vienna Conventions, on the interpretation of treaties.

82. Her delegation also found draft guideline 3.1.2 acceptable, but felt that a thorough analysis should be conducted into what constituted a "specified reservation". That which fell outside the scope of unspecified reservations should meet the criteria of the "object and purpose of a treaty". With respect to draft guidelines 3.1.3 and 3.1.4, her delegation agreed that "implicitly authorized reservations" and "permissible specified reservations" should also pass the test of compatibility with the object and purpose of a treaty.

83. She welcomed the Commission's recommendation that the Secretariat, in consultation with the Special Rapporteur, should organize a meeting, during its fifty-ninth session, with United Nations human rights experts to discuss issues relating to reservations to human rights treaties. The preliminary conclusions on reservations to normative multilateral treaties, adopted by the Commission in 1997, would constitute a good basis for such discussions.

84. Almost 10 years of work had demonstrated the difficulties of codifying international law on unilateral acts of States. As noted in paragraph 174 of the Commission's report, those difficulties were compounded by the fact that the concept of a unilateral act was not uniform. Her delegation therefore believed that the Commission should finish its work on that topic, with the adoption of the Guiding Principles applicable to unilateral declarations of States capable of creating objections, which essentially stressed that States could undertake legal obligations through unilateral declarations whose binding character was based on the fundamental legal principle of good faith. The Guiding Principles also put forward certain conditions which must be met for such declarations to produce legal obligations. Her delegation continued to believe that the role played by unilateral acts of States was very rich and full of varied effects and that it met the real needs of States and the international community. It would give careful consideration to the Guiding Principles and the related commentaries, bearing in mind that the binding force of a unilateral declaration depended on the circumstances of the case.

85. Lastly, she said that it would have been useful to characterize the different types of unilateral acts (recognition, promise, notification, waiver and protest) and to study other types of act in order to determine whether they should be included in that characterization. Since that approach had failed, however, her delegation was gratified to learn that the Commission proposed to end its consideration of the topic.

86. **Mr. Tajima** (Japan) said that, while his delegation agreed with the Special Rapporteur that the guidelines on reservations to treaties should be as detailed and comprehensive as possible, it noted that more than 10 years had passed since the Commission had begun to consider the topic and would therefore welcome a broad overview of the guidelines in the near future. It appreciated the Special Rapporteur's devotion to the issue of the object and purpose of the treaty, which was usually identified in the reservation and objection to each treaty. As the permissibility of a reservation differed according to the nature of each treaty, it might be difficult to agree upon a single general definition of that concept.

87. With regard to the articles on competence to assess the validity of reservations, his delegation felt that the competence of the monitoring bodies established by the treaty should be decided in accordance with the relevant treaties of those bodies. However, holding a meeting between the Commission and United Nations human rights experts would facilitate the elaboration of both substantive and procedural parts of the articles on that topic. Lastly, the Commission had rightly focused on a single category of unilateral acts of States, and there was no need to proceed to codification under the general heading "Unilateral acts of States".

88. **Mr. Fitschen** (Germany), referring to the topic of reservations to treaties, said that invalid reservations remained a major issue, particularly with regard to treaties that included human rights guarantees and treaties on combating international terrorism. Special vigilance was required to counteract attempts to undermine or call into question adopted standards by introducing exceptions via reservations. His delegation therefore noted with satisfaction that awareness of the issue had increased in recent years. It also very much appreciated that the Commission considered the topic to be of great relevance.

89. The protection of human rights was one of the areas that was consistently relevant with respect to

issues relating to reservations. The European Convention on Human Rights had long accepted a role in determining the validity or invalidity of reservations similar to that of the United Nations treaty-monitoring bodies, and for some 20 years the competence of the European Court of Human Rights to rule on the validity of reservations had been an integral part of human rights under the Convention. In addition, the Court's case law had helped the severability doctrine achieve acceptance within the Council of Europe. Pursuant to that doctrine, a State that had made an invalid reservation would be considered to be fully bound by the treaty. That development had not yet been extended to the realm of the universal protection of human rights, but if it was decided to reopen the debate on the Commission's preliminary conclusions, some European countries would probably welcome the chance to revisit the issue.

90. It remained doubtful whether the efficacy of human rights guarantees was ensured if the parties to a human rights instrument were in principle given carte blanche to rewrite its provisions. Rather, it was the structure of normative treaties which set them apart from traditional reciprocal treaties and therefore justified their "constitutionalization", at least *de lege ferenda*. If the Commission was not ready to abandon the more conservative concept of a reservation system based on the rules of the Vienna Convention on the Law of Treaties, it should at least consider an adjustment during its discussions on both the preliminary conclusions and the draft guidelines. Under such an adjustment, where treaty-monitoring bodies had actually been given competence to determine whether reservations to treaties were valid, such competence should prevail over any other mechanism with the same purpose. In all other cases it would remain necessary to develop procedures and practices within the existing system which would entice even more States to respond to inadmissible reservations and, where necessary, object to them.

91. **Ms. Williams** (United Kingdom) said that, although her delegation generally supported a consultative approach to all topics within the Commission's programme, it questioned the need for a special meeting with United Nations human rights experts. Her delegation firmly believed that reservations to normative treaties, including human rights treaties, should be subject to the same rules as reservations to other types of treaties. Human rights treaty monitoring bodies were competent to rule on the status or consequences of a particular reservation solely when that power was provided by the treaty. In all other circumstances, such conclusions were not determinative. Ultimately, it was for the reserving State to take action to address any uncertainty.

92. With regard to the draft guidelines referred to the Drafting Committee, her delegation wished to reiterate its previous observations on draft guidelines 3.1.7 to 3.1.13. It remained sceptical as to whether it was possible, or even desirable, to clarify the concept of the object and purpose of a treaty in the abstract. The comments she had just made on the role of treaty-monitoring bodies were also of relevance to draft guidelines 3.2 to 3.4.

93. Turning to the guidelines provisionally adopted by the Commission, she said that draft guideline 3.1.1 clarified the meaning of article 19, subparagraph (a), of the Vienna Convention on the Law of Treaties. Her delegation agreed with the Commission that that subparagraph concerned only reservations expressly prohibited by the treaty. It did not accept that certain treaties, by their nature or purpose, implicitly prohibited reservations. While welcoming the flexible approach adopted by the Commission in draft guideline 3.1.2, which attempted to clarify the meaning of the term "specified reservations", her delegation remained concerned that the definition might not capture all circumstances in which a reservation might be "specified". It also agreed with the Commission's draft guidelines 3.1.3 and 3.1.4, which provided that any reservation not prohibited by the treaty, or not a "specified" reservation, must be compatible with the object and purpose of the treaty. However, it questioned the reference in the commentary concerning the applicability of article 20, paragraphs 2 and 3, of the Vienna Convention, which, in the view of her delegation, did not apply, or applied only by analogy, to impermissible reservations. Draft guideline 2.1.8 and the associated commentary were also of concern; they should indicate more clearly when a reservation was considered "manifestly valid", given that the provision purported to extend to all three categories of impermissible reservations in article 19. It was not clear why the depositary, rather than the States parties, was in a position to determine whether a particular reservation was incompatible with the object and purpose of the treaty. The guideline also failed to consider the possible implications of that change.

Many States held the view that the role of the depositary was to transmit the text of reservations to the treaty parties and remain neutral and impartial.

94. Lastly, her delegation hoped that the 10 Guiding Principles on the topic of unilateral acts of States would be the final product on that topic. She would not comment on the substance of the principles other than to state that the intention of the State was paramount in that context.

95. **Mr. Tladi** (South Africa) said that the draft guidelines on reservations to treaties were generally faithful to the text and spirit of the Vienna Convention on the Law of Treaties, especially its article 19. His delegation recognized the negative impact that too many reservations could have on the integrity of multilateral conventions. However, it also understood the need for reservations as a means to promote much greater participation by States in such conventions. That was why it encouraged Member States to heed the provisions and spirit of article 19 of the Vienna Convention, which served to limit the kinds of reservations that were acceptable under international law and thereby struck a delicate balance between the integrity of conventional law and the interest in greater participation.

96. The second part of draft guideline 2.1.8 was problematical in providing that if the author of a manifestly invalid reservation maintained that reservation, then the depositary, when communicating the text of the reservation to other States, would also indicate the nature of the legal problems raised by the reservation. In doing so, the draft guideline went beyond the role envisaged for the depositary in the Vienna Convention and raised a number of questions about the implications and status of the legal opinion of the depositary. Moreover, such an opinion might have the effect of prejudging a legal question and taking the initiative away from States. His delegation was not in favour of impermissible or invalid reservations and was not opposed to the practice of treaty-monitoring bodies' expressing an opinion as to the validity of reservations. However, it was concerned about the potential for transferring an adjudicatory role to depositaries.

97. **Mr. Astradi** (Italy) said that the Commission would soon consider some of the most controversial questions relating to reservations to treaties, concerning the way in which a reservation to a treaty was assessed. In the light of the answer given to those questions, the Commission should revise its preliminary conclusions on reservations to normative multilateral treaties. The few draft guidelines adopted by the Commission in 2006 did not raise difficulties for his delegation. However, it might be said that they added further complications to the text and commentary. The topic was growing increasingly complex, and the usefulness of the guidelines would seem to depend on the Commission's ability to provide an easily understandable text to which States could refer in their practice.

98. His delegation noted with appreciation the Commission's adoption of a set of Guiding Principles on unilateral acts. However, it was not entirely clear whether the Commission intended to conclude its examination of the topic or had produced a preliminary text before engaging in a more exhaustive examination of practice and eventually adopting draft articles. While the Guiding Principles dealt only with cases in which a State deliberately intended to undertake legal obligations unilaterally, they did not fail to acknowledge that legal effects were often linked to the expectations that a State's conduct might have raised among other States. Certain examples to which the commentaries referred might be understood to concern that type of situation or some implied agreement, rather than the unilateral assumption of legal obligations.

The meeting rose at 1 p.m.

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Chairman: Mr. Gómez Robledo (Mexico)

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Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*)

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The meeting was called to order at 4.40 p.m.

Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*) (A/61/10)

1. **Ms. During** (France) said that she would not comment on the draft guidelines on reservations to treaties adopted by the International Law Commission at its fifty-eighth session, except to point out that, in her delegation's view, draft guideline 2.1.8 (Procedure in case of manifestly invalid reservations) did not reflect the law or the practice relating to the role of the depositary. The draft guideline gave the depositary the power to assess the validity of reservations and, where appropriate, inform interested parties of a reservation that, in its view, raised legal problems. The depositary should not, however, have such a power in the absence of a provision expressly authorizing it. Its duties should be limited to registering and communicating reservations, even if it considered them "manifestly invalid".

2. The draft guidelines relating to the competence of the treaty monitoring bodies, currently being considered by the Drafting Committee of the Commission, raised questions not unrelated to the point she had made about draft guideline 2.1.8. Although it was not uncommon for such bodies to be given competence to assess the validity of reservations, draft guideline 3.2.1 (Competence of the monitoring bodies established by the Treaty) seemed to confer competence to assess the validity of reservations as a direct result of the competence to monitor the treaty. Although, as the Special Rapporteur was at pains to emphasize, the text did not aim to give such bodies competence for which no provision had been made, it would be preferable to find a formulation that avoided such an automatic link and rather emphasized the need to insert in treaties clauses specifying the competence of monitoring bodies to assess the validity of reservations, as set out in draft guideline 3.2.2.

3. Draft guidelines 3.2.3 (Cooperation of States and international organizations with monitoring bodies) and 3.2.4 (Plurality of bodies competent to assess the validity of reservations) were unexceptionable, although their usefulness was questionable. That was the case, in particular, with draft guideline 3.2.4, which seemed not to consider the possibility that monitoring bodies might disagree on the validity of reservations.

4. Her comments naturally applied also to the competence of the human rights treaty bodies. In that connection, the Commission had requested the views of Governments on adjustments they considered necessary to introduce in the "Preliminary conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties including Human Rights Treaties", adopted by the Commission at its forty-ninth session. In her delegation's view, conclusions 1 to 3 and 10 were entirely acceptable. Conclusions 5 to 9, however, should be reviewed in the light of the comments made at the fifty-eighth session on draft guidelines 3.2 et seq. and the outcome of the Commission's meeting with United Nations experts in the field of human rights.

5. The question of non-validity of reservations, which the Commission had started to discuss during its fifty-eighth session, was a difficult one, which the Vienna Conventions on the Law of Treaties had not resolved. For that very reason, the Commission should try to clarify the questions of the consequences of non-validity and the effect of an objection to a reservation. If it failed to do so, the Guide to Practice would not fully meet the expectations that it had legitimately aroused. Above all, the Committee should, when it came to discuss draft guidelines 3.3.2 to 3.3.4, clarify the concept of nullity and show the distinction between the separate effects of unilateral and collective acceptance of a reservation.

6. The new definition of the object and purpose of a treaty, contained in draft guideline 3.1.5, represented a marked improvement on the original wording, whichever of the alternatives was chosen, by stressing the rights and obligations indispensable to the "general architecture" of the treaty, thus making it possible to observe both the spirit and the letter — or the "balance" — of the treaty.

7. The principle contained in draft guideline 3.3 (Consequences of the non-validity of a reservation) was entirely acceptable, although its title did not really reflect the content of the guideline, which related rather to the causes of non-validity. Draft guideline 3.3.1 (Non-validity of reservations and responsibility), on the other hand, usefully showed that the consequences of the non-validity of a reservation arose from the law of treaties, not the law of international responsibility.

8. **Ms. Wilcox** (United States of America) said, in relation to reservations to treaties, that the Commission should proceed cautiously in considering what types of reservation might be invalid because they were incompatible with the object and purpose of a treaty. It should recognize that many States had felt able to become parties to treaties owing to the possibility of making appropriate reservations in the light of their national laws or legal systems. The Commission should also give careful consideration to statements drawing attention to the fact that monitoring bodies should not be assessing the validity of reservations unless the treaty expressly gave them that authority, which was very unusual.

9. With regard to unilateral acts of States, a particularly challenging topic, she said that the Guiding Principles adopted by the Commission were a fitting conclusion to the Commission's work on the topic. Her delegation welcomed the Commission's decision to focus on formal declarations formulated by a State with the intent to produce obligations under international law. States should be able to make public statements without fearing that they might inadvertently be creating obligations that were binding under international law; they should be bound by unilateral public declarations only when they intended to be. The efficacy of the Commission's principles lay in the extent to which they would serve that objective. The provision in Guiding Principle 7 that, in case of doubt, obligations must be interpreted in a restrictive manner, was essential in any determination as to the legal effect of a unilateral declaration. The Commission's conclusions regarding the interplay between unilateral declarations and peremptory norms of international law should not give rise to any controversy. There could be no question of unilateral declarations by a State trumping peremptory norms of international law.

10. Her delegation was concerned by the content of Guiding Principle 10, which concerned the revocation of unilateral declarations. There was an understandable desire to limit arbitrary revocations of unilateral declarations in cases where a State had clearly manifested its intent to be bound and there had been detrimental reliance on that declaration by the addressee. It was not obvious, however, that conditions should be imposed upon the revocability of such declarations, in accordance with the principle embodied in article 62 of the Vienna Convention on the Law of Treaties (Fundamental change of circumstances). A fundamental change of circumstances might justify the revocation of a declaration even if there had been a clear manifestation of intent to be bound and notwithstanding the other considerations set out in article 62 of the Convention. Since unilateral declarations were not the same as agreements negotiated among States, rules relating to the revocation of such agreements should not necessarily apply automatically to unilateral declarations.

11. **Mr. Makarewicz** (Poland) noted that between its fiftieth and its fifty-seventh sessions the Commission had provisionally adopted 71 draft guidelines on reservations to treaties, with some 20 more in the pipeline. The numbers were impressive, but he feared that the proliferation of detailed guidelines held out little hope for a successful conclusion to the topic in the near future.

12. Draft guideline 3.1 (Permissible reservations) might well be superfluous, in view of the rules contained in the Vienna Convention on the Law of Treaties. The only reason to retain it would seem to be the desire to make the draft guidelines a complete statement of the rules on reservations to treaties. Draft guideline 1.6 (Scope of definitions), meanwhile, needed clarification. There was no explanation of what the "rules applicable to them" were or where they could be found.

13. Draft guideline 2.1.8 (Procedure in case of manifestly invalid reservations) gave rise to concern, for it inappropriately extended the functions of the depositary. According to a well-established customary rule, codified clearly in the 1969 and 1986 Vienna Conventions, the depositary was a neutral administrator of a treaty, with an obligation to act impartially. There was no requirement for it to pass judgment on the legality of the instruments deposited with it, except with regard to technical matters of a purely formal nature. The draft guideline would be detrimental to that rule and create more problems than it sought to solve.

14. With regard to the recommended meeting between the Commission and United Nations experts in the field of human rights, his delegation would be offering the Commission its view on possible adjustments to the "Preliminary conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties including Human

Rights Treaties", adopted by the Commission at its forty-ninth session.

15. Turning to the topic of unilateral acts of States, he said that the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations were, despite the many years of work devoted to the topic, descriptive rather than prescriptive. Moreover, their scope was restrictive: not only were they limited to unilateral declarations of State capable of creating legal obligations but were a departure from the Commission's previous approach, which had generally been based on analogies with the law of treaties. Regrettably, their adoption of the second reading seemed to have definitively concluded the Commission's work on the topic. Nor had any serious consideration been given to the ninth report (A/CN.4/569 and Add.1) of the Special Rapporteur, who had clearly been unable to convince the Commission to persist with its original approach. The end result was not entirely satisfactory, but it might be the only possible one, given the serious differences of opinion on the topic within the Commission and among States. Perhaps the time was not yet ripe for more developed codification. Meanwhile, State practice might develop faster thanks to the existence of the Guiding Principles, which would, at least, enable States to judge with reasonable certainty whether and to what extent their unilateral conduct was legally binding at the international level and would thus strengthen the principle of good faith in international relations.

16. **Ms. Kaplan** (Israel), addressing the topic of reservations to treaties, said that her delegation still had some doubts concerning both alternative versions of draft guideline 3.1.5 (Definition of the object and purpose of the treaty) or (Incompatibility of a reservation with the object and purpose of the treaty). Such elements as "essential rules", "raison d'être", "general architecture" or "balance of the treaty", which were common to both alternatives, did not add any substantial clarification and might even complicate the definition of the object and purpose of the treaty.

17. With regard to draft guideline 3.2 (Competence to assess the validity of reservations), her delegation proposed a number of amendments, as a result of which the provision would read:

> "The following are competent to rule on the validity of reservations to a treaty formulated by a State or an international organization:
>
> - The other contradicting States (including, if applicable, their domestic courts) or other contracting organizations;
> - Dispute settlement bodies that are authorized by the contracting States as competent to interpret or apply the treaty and reservations to it; and
> - Treaty implementation monitoring bodies established by the treaty and authorized by it as competent to interpret or apply the treaty and reservations to it."

The purpose of the proposed changes was to avoid implied authorization for any monitoring body to pass judgement on the validity of reservations. In addition, she wondered what relevance the ruling of a domestic court had to the validity of a reservation under international law. In Israel, domestic court rulings affected only internal law.

18. With regard to draft guideline 3.2.1 (Competence of the monitoring bodies established by the Treaty) the first paragraph should similarly be reworded to read: "Where a treaty establishes a body to monitor application of the treaty, and authorizes it to make decisions on reservations to treaties, that body shall be given competence by the contracting States to assess the validity of reservations ...".

19. In accordance with its view that the role of the monitoring bodies should be given explicit expression, her delegation favoured the deletion of the square brackets in draft guideline 3.2.3 (Cooperation of States and international organizations with monitoring bodies). Her delegation accepted draft guideline 3.2.4 (Plurality of bodies competent to assess the validity of reservations), but drew attention to the fact that the different mechanisms for assessing the validity of reservations might not be mutually compatible.

20. Consideration should be given to deleting draft guideline 3.3.3 (Effect of unilateral acceptance of an invalid reservation), which was somewhat ambiguous, as well as seeming to contradict draft guideline 3.2.4. As for draft guideline 3.3.4 (Effect of collective acceptance of an invalid reservation), the depositary's role was, in her delegation's view, a purely technical one. The draft guideline should therefore be very cautious in extending that role. Secondly, the meaning

of the term "collective acceptance" was unclear. In some cases, there might be a need for unanimous acceptance rather than merely collective acceptance. The decision on whether a specific case had achieved collective acceptance or not might have far-reaching consequences and was therefore, beyond the authority of the depositary. Such a procedure might also create vagueness and undesirable differences between the text of the treaty and its actual meaning.

21. With regard to the topic of unilateral acts of States, the Commission should insist on a rigid approach to Guiding Principle 4: under Israeli law, for example, ministers or high-ranking officials required express authorization in order to engage the State through unilateral acts or declarations.

22. In view of the possibility of misunderstandings regarding declarations by States, and their sensitive nature in the context of inter-State relations, she urged the Commission to pay special attention to Guiding Principle 7, which called for a restrictive interpretation of such declarations. In case of any doubt concerning a State's intention, it was preferable to interpret a declaration as non-binding under international law. Her Government would attribute legal significance to its own or other States' unilateral acts only if there existed a clear and unequivocal intention to effect binding legal consequences.

23. **Mr. Pellet** (Special Rapporteur) welcomed the opportunity to respond to the Committee's comments on the draft guidelines on reservations to treaties. In his view, the dialogue between the special rapporteurs of the International Law Commission and the members of the Sixth Committee was very important in reinforcing the relationship between the two bodies. Nevertheless, there were two significant limitations to that dialogue. First, Governments' comments generally arrived, after the Commission had taken a position on the proposals submitted by its special rapporteurs. Once the Commission had adopted a set of draft articles or guidelines on first reading, it generally did not re-examine them until the second reading several years later, and it was only then that the comments of States, whether made in the Sixth Committee or submitted in writing following the adoption on first reading, would be taken fully into account.

24. That was not to say that the discussion in the Sixth Committee was not useful. On the contrary, it enabled the special rapporteur to discern trends and get a sense of the majority opinion — when there was one — on the draft articles or guidelines under discussion. If the members of the Sixth Committee expressed strong reservations about something, most special rapporteurs would modify their proposals accordingly. Moreover, the discussion in the Sixth Committee could be very useful in charting the course for the Commission's future work. Indeed, one of the most helpful forms of input that Governments could provide was suggestion of topics for study by the Commission. As he had said on previous occasions, however, the Committee's deafening silence in that regard was cause for concern. Governments could also influence the Commission's work on a particular topic by responding to the issues raised each year in chapter III of the Commission's report.

25. The second limitation to the dialogue between the special rapporteurs and the Committee was of a different nature: once the Commission had adopted a set of draft articles or guidelines, they no longer "belonged" to the special rapporteur, and it could happen that the draft ultimately submitted to the Sixth Committee for discussion did not reflect his or her personal convictions.

26. Turning to the topic of reservations to treaties, he had taken note of the generally negative reaction to draft guideline 2.1.8 (Procedure in case of manifestly invalid reservations), in particular the role assigned to the depositary, which most speakers had seemed to regard as excessively important. He assumed that that view also applied to draft guideline 3.3.4, although not many speakers had said so explicitly. While the Commission should certainly bear those reservations in mind at the second reading of the draft guidelines, he was a little surprised at the sudden outcry over draft guideline 2.1.8, which had been adopted by the Commission and discussed by the Sixth Committee three or four years earlier. It had been included, together with its slightly modified commentary, in the Commission's report for 2006 only because the Commission had decided to replace the words "permissibility" and "non-permissibility" with "validity" and "invalidity" or "non-validity". He sincerely did not understand why there would be reluctance to use the concept of validity in respect of reservations. It was essential to draw a distinction between valid and invalid reservations. Whether or not a reservation was valid mattered a great deal, and, in his opinion, an objection to an invalid reservation

should not be subject to the same rules as an objection to a valid reservation.

27. He was similarly puzzled at the opposition of some States to his attempt, in draft guideline 3.1.5, to clarify the ambiguous concept of the object and purpose of the treaty. When the Commission, with the support of the Sixth Committee, had decided to re-open the question of reservations to treaties, despite the existence of the Vienna Conventions, it had been at least in part because of the lack of clarity — in doctrine, jurisprudence and State practice — with regard to that fundamental concept. In his view, it might be possible to achieve greater clarity by combining draft guidelines 3.1.5 and 3.1.6, which he considered inseparable.

28. His proposals regarding the role of treaty bodies seemed generally to have been well received, the only criticism of the draft guidelines being that they were not detailed enough. The Committee's comments in that regard would doubtless lead the Commission, during its next session, to revisit its 1997 preliminary conclusions, which were closely related to the complex issue of the role of treaty bodies. He continued to believe that it would be extremely useful to organize a meeting with United Nations experts in the field of human rights, including representatives from human rights treaty bodies, and appealed to the Committee and to the General Assembly to express explicit support for such a meeting in the resolution to be adopted on the report of the International Law Commission on the work of its fifty-eighth session.

29. Some delegations had remarked on the slowness with which the work on the topic was proceeding. That might be true, but the subject was an extremely complex one, from both a theoretical and a practical standpoint. It was preferable, in his view, to proceed slowly and carefully in order to produce a Guide to Practice that would truly be useful to States in dealing with problems relating to reservations to treaties.

30. He thanked the Committee for its comments on the topic. Although he might disagree with some of the views put forward, he could assure members that the Commission and its Drafting Committee attached great importance to the input received from the Sixth Committee and would consider all comments with an open mind.

31. Speaking as the Chairman of the Working Group on Unilateral Acts of States, he said that several delegations had noted that the Commission had limited its study of the topic to unilateral declarations of States. That was because the Commission had deemed that it would be impossible to draw any specific conclusions on any aspect of the topic other than unilateral declarations made by States with the intention of creating legal obligations. If Governments wished the Commission to broaden the scope of its work to include other aspects, they should express that view. However, the Working Group on the Long-term Programme of Work, after weighing the pros and cons, had not recommended the inclusion of unilateral acts of States on the Commission's long-term programme of work, and in the absence of specific instructions from the Sixth Committee, it was unlikely that the Commission would pursue the topic any further. Hence, Governments would need to decide whether the adoption of the Guiding Principles and their accompanying commentary marked the conclusion of the Commission's work or whether additional work on the topic should be undertaken.

The meeting rose at 5.55 p.m.

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Held at Headquarters, New York, on Wednesday, 1 November 2006, at 10 a.m.

Chairman: Mr. Gómez Robledo .... (Mexico)
later: Mr. Barriga (Vice-Chairman) .... (Liechtenstein)

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The meeting was called to order at 10.10 a.m.

Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*) (A/61/10)

1. **Mr. Pambou-Tchivounda** (Chairman of the International Law Commission), introducing chapters X-XII of the Commission's report, said, with regard to chapter X, "Effects of armed conflicts on treaties", that in 2006 the Commission had had before it the second report of the Special Rapporteur, covering draft articles 1 to 7 (A/CN.4/570 and Corr.1). The report had focused on the comments on those draft articles made in the Commission and the Sixth Committee in 2005.

2. Summarizing the debate in the Commission (A/61/10, paras. 182-211), he said that reference had been made to the fact that it was not possible to maintain a strict separation between the law of treaties and other branches of international law, especially that relating to prohibition of the use or threat of force in international relations. Suggestions had been made to broaden the scope of the topic to include, inter alia, the effect on the rights of third States parties to a treaty, the distinction between effects on specific provisions of the treaty as opposed to on the entire treaty, as well as that between the effects on the treaty itself and those on the obligations arising from it.

3. With regard to the use of terms, draft article 2 (b), which defined "armed conflict", had remained controversial. Support had again been expressed for including non-international conflicts, military occupations, and territories under international administration. However, each of those proposals had been criticized, particularly because the latter situations were not traditionally viewed as part of a definition of armed conflict. A strong opinion had been expressed that an aggressor State could not be placed on an equal footing with the State exercising its right to self-defence, whether individual or collective, in accordance with the Charter of the United Nations.

4. General support had been expressed for the retention of draft article 3, albeit subject to drafting changes. As in 2005, draft article 4 had attracted criticism for its reliance on the criterion of intention. It had been suggested that the criterion had lost its significance after the Second World War and that it was not realistic to think that parties contemplated the effect of an armed conflict on a treaty at the time of its conclusion. Comments on draft article 5 had focused primarily on its formulation. General support had been expressed for the Special Rapporteur's proposal to delete draft article 6. Draft article 7 had again elicited suggestions as to the inclusion or deletion of specific categories of treaties. The Special Rapporteur suggested that the list of treaties should be replaced by an annex containing State practice and jurisprudence. Another suggested approach had called for enumerating the factors which might lead to the conclusion that a treaty or some of its provisions should continue or should be suspended or terminated in the event of armed conflict. Lastly, it had been decided not to transmit the draft articles to a working group but to await a third report by the Special Rapporteur.

5. Turning to chapter XI, "The obligation to extradite or prosecute (*aut dedere aut judicare*)", he recalled that the topic had been included in the Commission's programme of work in 2005. At its fifty-eighth session the Commission had considered the preliminary report by the Special Rapporteur (A/CN.4/571), which contained a set of observations concerning the substance of the topic, marked the most important points for further consideration and included a preliminary plan of action for future work.

6. Summarizing the debate in the Commission (A/61/10, paras. 215-232), he said that much of the debate had focused on proposals to delimit the scope of the topic, for example, by restricting it to only certain categories of crimes under international law, particularly the most serious ones, and limiting the scope of the work to the objective of the obligation, namely, to combat impunity by eliminating safe havens for persons suspected of having committed such crimes. The status of the obligation under customary international law had also been discussed. It had likewise been suggested that the Commission should consider certain practical difficulties encountered in the process of extradition. As to the Special Rapporteur's treatment of the topic's relationship with the principle of universal jurisdiction, a general preference had been expressed for drawing a clear distinction between the concepts and focusing only on the obligation to extradite or prosecute. The Special Rapporteur had also advised against considering the so-called "triple alternative", involving the concurrent jurisdiction of an international tribunal.

7. Preliminary support had been expressed for proceeding on the basis of draft rules to be proposed by the Special Rapporteur. The Commission had also recommended that future work on the topic should be undertaken on the basis of a systematic study of State practice, focusing on contemporary practice, including national jurisprudence. Accordingly, paragraphs 30 and 31 of the Commission's report contained additional details on the type of information the Commission would appreciate receiving from Governments in connection with the topic.

8. With regard to chapter XII, "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", he recalled that the topic had been included in the Commission's programme of work in 2002. The Commission had established a Study Group that year which had finalized its work in 2006, enabling the Commission to complete its work on the topic as well. The objective of the Study Group's work had been to prepare a two-part outcome. The first part, which was to comprise a condensed set of conclusions emerging from the studies and discussions of the Study Group, was embodied in sections D I and D.II of chapter XII, entitled "Background" and "Conclusions of the work of the Study Group", respectively. In particular, the 42 conclusions in section D.II were intended to be a concrete, practice-oriented set of brief statements that summarized the conclusions of the Study Group and constituted a set of practical guidelines to help thinking about and dealing with issues relating to the issue of fragmentation in legal practice. As noted in chapter II of its report, the Commission had taken note of the conclusions and had commended them to the attention of the General Assembly.

9. The second part of the outcome was to be a relatively large analytical study prepared on the basis of the outlines and studies submitted by individual members of the Study Group, which was to describe the phenomenon of fragmentation from the point of view, in particular, of the Vienna Convention on the Law of Treaties. The analytical study, which provided the background against which the 42 conclusions had been elaborated, had been finalized (A/CN.4/L.682 and Corr.1), was available on the Commission's website and would be included in its *Yearbook*.

10. In accordance with earlier decisions endorsed by the Commission, the Study Group had focused on the substantive aspects of fragmentation, setting aside institutional considerations pertaining to fragmentation such as conflict of jurisdiction between particular judicial institutions. More generally, the Study Group had adopted a perspective emphasizing international law as a legal system. In its view, the rules and principles of such a system acted in relation to and should be interpreted against the background of other rules and principles. The general related to the particular in a web of interrelationships in which no regime was self-contained in the sense that it could operate in a vacuum without any connection with general international law.

11. The various rules relationships existed on several levels, whether vertically as in hierarchical rules or horizontally. The formulation of the rules could involve greater or lesser specificity and generality and their validity or priority might date back to earlier or later moments in time. In such a rules-based system, general principles of treaty interpretation, including the principle of harmonization, the principle of integration and principles such as *lex specialis*, *lex posterior*, *lex prior* and *lex superior*, were applied to resolve conflicts. Articles 30, 31, 32, 41 and 53 of the Vienna Convention on the Law of Treaties were invoked to untangle a web of complex legal questions. The Vienna Convention provided all the tools of the law of treaties needed to resolve most problems encountered in international law as a legal system.

12. The 42 conclusions in section D.II reflected a common effort to address the substantive aspects of fragmentation. General conclusions (1) to (4) situated the interplay of rules relationships within that legal system, in which practitioners were involved in a process of legal reasoning to resolve normative conflicts. The Study Group had focused on four approaches to the resolution of conflicts of norms in international law. The first pertained to the relationship between special and general law, as reflected in conclusions (5) to (16) concerning the study of the function and scope of the *lex specialis* rule and the question of self-contained regimes. The second concerned the relations of law to its normative environment. Conclusions (17) to (23), on the study on the interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (art. 31 (3) (c) of the Vienna Convention on the Law of Treaties), addressed that aspect. The third approach concerned the relations between the *lex prior* and the *lex posterior*, which were

reflected in conclusions (24) to (30) relating to the study on the application of successive treaties relating to the same subject matter (art. 30 of the Vienna Convention) and the study on the modification of multilateral treaties between certain of the parties only (art. 41 of the Vienna Convention). The fourth approach concerned the relations between laws at different hierarchical levels, which were reflected in conclusions (31) to (41) on the study on hierarchy in international law, in particular *jus cogens*, obligations *erga omnes*, and Article 103 of the Charter of the United Nations. Conclusion (42) addressed the overarching theme borne out by the study, namely, the principle of harmonization, which admittedly had its own limitations, particularly when genuine conflicts were involved. It was hoped that the conclusions would help users to focus on the core issues that would enable them to resolve complex legal issues relating to normative conflicts.

13. There was no question that the fragmentation of international law reflected the diversity of the international social order. It was thus a natural and almost inevitable phenomenon. Indeed, one of the main conclusions of the analytical study was that the emergence of special regimes or other forms of functional specialization in international law had not seriously undermined legal security, predictability or the equality of legal subjects. At the same time, the international system was neither homogeneous nor hierarchical. It was therefore necessary to pay increasing attention to questions concerning the collision of norms and regimes and to the principles, methods and techniques for dealing with such collisions. There was an obvious need for technical vigilance among practitioners in a continuous process of legal reasoning to address conflicts that might arise.

14. The topic had been placed on the Commission's agenda because of concerns that the unity of international law was under threat; that the "general" had been giving way to the "special". The results of the Study Group's work provided hope that that was perhaps not entirely the case. General international law was the thread holding relations among States together within the international legal system. As the web of international law grew wider, its practitioners must ensure that conflicts were resolved bearing in mind the omnipresence of general international law.

15. **Ms. Jacobsson** (Sweden), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that those countries had, from the outset, taken a great interest in the topic on the fragmentation of international law. First, the topic was an important one; second, the Commission had allowed itself to undertake work on a topic that did not necessarily lead to the further codification or progressive development of international law. Rather, in helping to explain a phenomenon of the current legal environment, it had addressed the question of how international lawyers might tackle the practical consequences of the widening scope and expansion of international law.

16. The Nordic countries viewed the fragmentation of international law as a sign of the vitality and increasing relevance of international law. States regulated real and potential problems through a variety of legal instruments and new or existing institutions. The resulting diversification, or fragmentation, of international law could be quite challenging. The 42 conclusions adopted by the Study Group were practical and would help practitioners and theoreticians to apply a systematic approach when they sought to analyse and solve problems arising from conflicting or parallel norms.

17. The Study Group's conclusions had a strong focus on States as the creators of legal norms and emphasized that most international law was dispositive law. Particular attention was paid both directly and indirectly to the principle *pacta tertiis nec nocent nec prosunt* (agreements neither bind nor benefit third parties). Although the Study Group had been correct to use the Vienna Convention on the Law of Treaties or the principles reflected therein as the general framework for its analysis, the Nordic countries regretted that it had left the question of institutions aside and had concluded that the issue of institutional competencies was best dealt with by the institutions themselves. Since States created, used and even dissolved institutions, institutional competencies must be recognized as the creations of States. As such, they might ultimately be subject to the will of States, however strong and independent the institutions might act or appear. It was therefore not entirely satisfactory to leave institutional matters to institutions. The issue of institutional competencies and their relation to and place in the substantive legal system definitely merited further examination.

18. That said, the Nordic countries trusted that the conclusions of the Study Group would be used as much

as the Commission's articles on State responsibility were. It was to be hoped that the entire body of the Commission's substantive documents on the fragmentation of international law, which functioned as a valuable commentary to the conclusions, would attract a publisher who would make them available to the wider international community.

19. **Ms. Popova** (Bulgaria) said that her delegation supported the general approach proposed by the Special Rapporteur on effects of armed conflicts on treaties. It agreed in particular with the premise that treaties should continue during an armed conflict unless there was a genuine need for suspension or termination, a premise that could be traced back to the principle *pacta sunt servanda* and the aim of promoting the security of legal relations between States. Bulgaria also supported the premise that the topic, although closely related to other domains of international law such as humanitarian law, self-defence and State responsibility, formed part of the law of treaties. The third element of the general approach endorsed by her delegation was the differentiated method — the premise that different effects were possible for different treaties.

20. With regard to scope (draft article 1), the question had arisen whether the draft articles should differentiate between bilateral and multilateral international treaties. In her delegation's view, the pattern of the Vienna Convention on the Law of Treaties should be followed in that regard in drafting the articles. In addition, Bulgaria would welcome extension of the scope of the draft articles to cover agreements concluded between international organizations and between States and international organizations, as well as regional agreements. In that way the draft articles would also cover agreements on the privileges and immunities of international organizations and their officials. Her delegation was also in favour of extending the scope of the draft articles to treaties being applied provisionally, as provided for in article 25 of the Vienna Convention, since such treaties were in fact operative and hence could be affected by an armed conflict in the same manner as treaties that had already entered into force. It was true, of course, that the Convention itself did not contain a general rule on the suspension or termination of the provisional application of treaties, dealing only with the case where the provisional application of a treaty was terminated because of the declared intention of a State not to become a party to it. Nevertheless, thought should be given to the question of whether the outbreak of an armed conflict would suspend or terminate the provisional application of treaties, the treaties themselves or both. For the sake of the clarity and stability of legal relations Bulgaria would prefer the latter option but was keeping an open mind.

21. With regard to the use of terms (draft article 2), the definition of "armed conflict" was one of the most sensitive aspects of the topic. Although there was agreement that the draft articles should not deal with the legality of armed conflicts, opinions varied widely on what the definition should include, the debate revolving chiefly around whether or not to include non-international armed conflicts. Internal armed conflicts had significantly outnumbered international armed conflicts in recent decades, and the distinction between the two was often blurred. A narrow definition would tend to strengthen the treaty regime while a broad definition might jeopardize it, yet a narrow definition would limit the relevance of the draft articles. The definition employed in the *Prosecutor v. Duško Tadić* case considered by the International Tribunal for the former Yugoslavia, cited by the Special Rapporteur in his second report (A/CN.4/570, para. 10), covered non-international armed conflicts, including internal conflicts where governmental armed forces were not involved, and avoided the complications deriving from the reluctance of some States formally to declare a state of war. Her delegation hoped that a deadlock on the issue could be avoided by stressing the limitation set forth in the chapeau of draft article 2, namely, that the definition was merely "for the purposes of the present draft articles". The definition employed in the *Tadić* case or a simpler formulation stating that the articles applied to armed conflicts whether or not there was a declaration of war could be used as a starting point for further discussion. Her delegation did not favour the alternative of following the language of article 73 of the Vienna Convention, which used a synonym, "hostilities", since that also required a definition. Moreover, "the outbreak of hostilities" had a temporal dimension and referred mainly to the beginning of the conflict. That would fit very well in draft article 3 but not in draft article 2. Of course, the term "armed conflict" could be used and not defined, leaving it to be determined on a case-by-case basis whether the draft articles applied to a particular conflict, taking into account the nature and extent of the conflict, but then definitions of the

"nature" and "extent" of a conflict might prove to be needed.

22. Her delegation agreed that draft article 3 contained the main philosophy of the provisions and articulated the departure from the traditional doctrine according to which treaties were terminated by armed conflict. Bulgaria welcomed the decision to replace "ipso facto" by "necessarily", since that wording made allowance for the abrogating effect of war on some treaties.

23. With regard to draft article 4, Bulgaria shared the concerns of other delegations regarding the difficulties of determining the intention of the parties and thought that the criteria for survival of treaties during an armed conflict should be sought primarily in their character, subject and objective. The indicative list put forward in draft article 7, paragraph 2, was indispensable in that regard. Intention should be explored only for treaties that were borderline cases. Bulgaria shared the general approval of draft article 5, which explicitly reaffirmed the principle that treaties containing express provisions stating that they were operative in case of an armed conflict would remain in force in wartime and the principle that armed conflict did not affect the capacity of States to conclude treaties. Draft article 6 on treaties relating to the occasion for resort to armed conflict was consistent with the general principle of the continuation of treaties during armed conflict. The general, and suitable, presumption was established that treaties whose status or interpretation had provoked the armed conflict would remain in effect unless the contrary intention of the parties was proved. It bore a relation to article 60 of the Vienna Convention on the Law of Treaties, which dealt with the hypothesis of a material breach as grounds for termination and suspension of the operation of a treaty, but went a step further by referring to the status and the interpretation of a treaty as possible grounds for termination or suspension of its operation.

24. With regard to draft article 7, her delegation agreed that some of the categories of treaties listed in paragraph 2 could be classified under the heading of "law-making treaties", in the sense of treaties that created rules for regulating the future conduct of the parties without creating an international regime, status or system. While the view could not be contested that most treaties did not automatically fall into one of the several categories listed, draft article 7 was useful in its current form, as the indicative list could provide clarity and guidance in the so-called "grey-area cases". Of course, an annex could be developed, either to replace paragraph 2 of the draft article or to complement it.

25. **Mr. Hafner** (Austria), referring to the topic "Effects of armed conflicts on treaties", said that his delegation wished to reaffirm its position that the draft articles should deal only with international armed conflicts. As the Special Rapporteur himself had pointed out, an extension of their scope of application would increase the number of problems. The distinction between international and non-international armed conflicts might be difficult to draw, but it was justified for several reasons. First, international humanitarian law was still based on such a distinction. Second, the other State party to a treaty might not be aware of the existence of a non-international armed conflict in a State, so that the inclusion of such conflicts in the scope of the draft articles would be detrimental to stability and predictability, two main objectives of the international legal order. Third, since no other State was involved in a non-international armed conflict, it was unclear to which other States parties the effects of the draft articles would then apply. Such situations should instead be governed by the provisions of the law on treaties. Other phenomena like the "war on terrorism" should certainly not be dealt with in the draft articles. However, his delegation supported extending them to cover military occupations, as addressed by the 1949 Geneva Conventions and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and treaties to which an international organization was a party.

26. His delegation looked forward with great interest to the future work of the Commission on the obligation to extradite or prosecute. The Special Rapporteur had already referred to Austrian legislation in his preliminary report (A/CN.4/571, para. 44).

27. The conclusions presented by the Study Group on the fragmentation of international law constituted a remarkable outcome along the lines originally intended and convincingly demonstrated that the task of the Commission was not limited to codification but encompassed other work relating to the development and application of international law. The conclusions drew attention to the problems arising out of the increased diversity of international law and highlighted the legal techniques and existing norms that governed the relations between the different regimes of

international law. His delegation hoped that the 42 conclusions would be taken note of by the General Assembly and published in the *Yearbook of the International Law Commission*. His delegation concurred with the contents of the conclusions *grosso modo*. Their wording, however, indicated the legal problems connected with the issue, as they quite frequently resorted to vague expressions such as "often" or "mostly", reflecting the fact that the general system of international law did not provide clear guidance on how to resolve possible conflicts of norms, a matter that was becoming more acute in a time when fragmentation was increasing. For more detailed comments on the topics he had mentioned, he drew attention to his delegation's written statement.

28. **Mr. Tajima** (Japan) said that the draft articles on the effects of armed conflicts on treaties should draw a distinction between the effects on bilateral treaties and those on multilateral treaties and between belligerent States and third States. Without drawing those distinctions, it could not be determined in a specific case whether treaties would or would not be suspended or terminated by armed conflicts. Moreover, it might not be correct in the light of the Charter of the United Nations to assume that there was no difference between an aggressor State and a State exercising its right of self-defence with regard to the legal effect of armed conflict on treaty relations. His delegation agreed that consideration should be given to situations involving non-State actors, such as non-international armed conflict and terrorism, in addition to armed conflict between States. However, since the effects on treaties of armed conflict involving non-State actors would not be precisely the same as the effects of armed conflict involving State actors alone, it would be appropriate to examine those differences. His delegation concurred with the Commission's decision that the draft articles were not yet ready for referral to the Drafting Committee.

29. His Government was particularly interested in the extent to which the obligation to extradite or prosecute had become customary international law, since ambiguity in that area could cause problems in addressing the issue of impunity. The Commission had requested information on legislation and practice on the topic. Regarding treaties containing the obligation to extradite or prosecute, Japan had concluded multilateral treaties, such as counter-terrorism treaties, including the Convention on the Physical Protection of Nuclear Material; narcotics control treaties, including the Single Convention on Narcotic Drugs; and anti-corruption treaties, including the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. It had made no reservations to any of those treaties. Japan had also concluded bilateral extradition treaties with the United States of America and the Republic of Korea, which obliged the parties to extradite fugitives to the other party upon request. However, there were several restrictions on extradition under those treaties, and they contained no provisions on the obligation to extradite or prosecute, at least not in the strict sense, nor did Japanese domestic legislation on extradition contain provisions on such an obligation.

30. Although the two products of the Study Group on the fragmentation of international law, the analytical study and the conclusions, did not represent the collective view of the full Commission and did not have legal effect for interpreting related treaties and principles, they nonetheless had considerable value in that they presented possible ways for States to address the issue in their international legal practice. His delegation fully appreciated the importance of the principle of harmonization in interpretation and hoped that the Study Group's conclusions would be widely referred to as a useful guideline.

31. **Mr. Lammers** (Netherlands), referring to the topic "Effects of armed conflicts on treaties", said that the issue of scope was dealt with rather succinctly and somewhat imprecisely in the Special Rapporteur's second report (A/CN.4/570 and Corr.1). The Commission had discussed the aspect of provisional application as an issue of whether or not the draft articles should cover treaties not yet entered into force. That might be too simple a way of looking at the reality of treaty practice, since there were treaties that had not yet entered into force but were provisionally applied by some States, and there could be treaties that had entered into force for some States and were provisionally applied by others. At issue was whether the multi-layered nature of treaty relations in the multilateral system was sufficiently covered in the work of the Special Rapporteur. It might be necessary to distinguish between the effects of armed conflict on bilateral treaties or treaties with a limited number of parties, on the one hand, and multilateral treaties, on the other.

32. With regard to the definition of armed conflict in draft article 2, it was important to keep in mind that no definition of armed conflict currently existed. The Commission must be careful not to draft a definition that could create problems in other fields of law, such as the law of armed conflict. It might to helpful to approach the International Committee of the Red Cross on the matter to ensure that the definition arrived at would not encroach upon the important work done in the field of international humanitarian law. The current definition was somewhat circular and referred to the outdated concepts of "war" and "declaration of war".

33. His delegation would prefer that the definition of armed conflict should include non-international armed conflicts, because such conflicts could seriously affect a State's ability to execute its treaty obligations. For the same reason, the definition should include military occupations. The inclusion of non-international armed conflicts would be a reference to a factual situation and in no way an expression of support for any of the parties to such a conflict. Inability to perform a treaty would be established by evaluating the factual situation in relation to the type of performance required from the State party under the treaty. However, consideration should be given to the position of the other party or parties, which might see their right to performance by their counterpart evaporate as a consequence of a conflict situation in that State. That was not a matter of interpretation but rather of execution of a treaty. The question was whether a State, which could not rely on its internal law as a justification for its failure to perform a treaty, might rely on an internal conflict as such justification. That suggested a situation like that contemplated in article 61 of the Vienna Convention on the Law of Treaties. Although the issue went beyond the definitions in draft article 2, it would require consideration in the future.

34. The obligation to extradite or prosecute (*aut dedere aut judicare*) was instrumental in achieving a world system of justice which deprived perpetrators of safe havens. In the era that had seen the establishment of the International Criminal Court, States had come to realize that there was a certain — at least moral — obligation to act, whether by extraditing or by prosecuting alleged perpetrators of the most serious crimes. However, in order to have the possibility of choosing between extradition and prosecution, a State must have jurisdiction, otherwise the only option open was extradition, which was in principle only possible where there was double incrimination. Theoretically it was therefore possible that a State might not be in a position to extradite because of the lack of a treaty or lack of double incrimination and at the same time unable to prosecute because of lack of jurisdiction. Such was the situation that the maxim *aut dedere aut judicare* aimed to combat, and where universal jurisdiction became an important complement to it.

35. Normally the State in which the offence occurred would have jurisdiction to prosecute an international crime. In practice, however, it was conceivable that non-territorial States might also have jurisdiction depending on varying degrees of connection with the offence (active personality principle, passive personality principle or protective principle). The obligation to extradite or prosecute had in recent years been included in many treaties concerning international crimes, giving States parties not only the capacity but also the obligation to exercise universal jurisdiction. The obligation was one to act, through extradition or prosecution, and presupposed the presence of the suspect in the territory of a State.

36. On the question of whether the obligation *aut dedere aut judicare* derived exclusively from treaties or also constituted a general obligation under customary international law, the Netherlands saw the obligation to extradite or prosecute as an obligation, created by treaty, to prosecute a person for whom extradition had been refused for crimes for which the Netherlands had criminal jurisdiction, on the basis of universal jurisdiction, specific treaties or national legislation. That position derived on the one hand from international human rights law, which prohibited arbitrary deprivations of liberty; from the constitution of the Netherlands, which explicitly prohibited any deprivation of liberty not based on a written rule of law; and from article 2 of the Extradition Act, which stated that extradition could occur only on the basis of a treaty to which the Netherlands was a party. In recent years the Netherlands had been adopting legislation accepting universal jurisdiction and the consequences of abiding by the *aut dedere aut judicare* rule, as contained in a number of treaties, by codifying implementation laws relating to international crimes (war crimes, genocide and torture) and crimes against humanity and by withdrawing its reservations to a number of treaties in relation to the precondition that an extradition request must have been made and refused before criminal jurisdiction could be exercised.

Legislation was being prepared on the last point. Although some multilateral treaties imposed the obligation *aut dedere aut judicare*, it did not necessarily follow that there existed a general rule of customary law with regard to universal jurisdiction that would impose such an obligation on States not parties to a treaty. That view was in line with the findings of the International Committee of the Red Cross in its study on customary international law.

37. The obligation to extradite or prosecute was construed by the Special Rapporteur as giving a State the choice between the two alternatives, but that view presupposed the existence of a choice, whereas in practice that was not always the case, for the reasons he had already explained. The Special Rapporteur had also suggested that there might be a third alternative: the transfer of the case to a competent international tribunal. The Netherlands saw that option rather as a variation on the theme of extradition, possible only in the event that a request had been made. With regard to the lack of a monitoring system, it was doubtful whether it would add anything to what was already known.

38. On the issue of priority jurisdiction, if the aim was to deny perpetrators of heinous crimes safe haven, it was an interesting idea that perhaps States with priority jurisdiction might have the obligation to exercise jurisdiction and to that effect request the extradition of the suspect. The concept was in line with the principle of complementarity in the Rome Statute of the International Criminal Court, whereby States had the first responsibility to prosecute and only in the event that a State was unwilling or unable did the Court have jurisdiction.

39. The obligation should first and foremost relate to crimes for which universal jurisdiction already existed by treaty: war crimes, genocide, torture, and terrorism. Although the Rome Statute presupposed national implementation regarding crimes against humanity, to date only two instruments on specific crimes against humanity had been concluded: the Convention against Torture and the International Convention on the Suppression and Punishment of the Crime of Apartheid. The Netherlands would be in favour of creating a regime of universal jurisdiction covering the full array of the category of crimes contemplated by article 7 of the Rome Statute. The creation of universal jurisdiction would be a means to make sure that both options — *dedere* and *judicare* — were open, so that there would be no impunity and no safe haven.

40. Following the establishment of the International Criminal Court and the events of 11 September 2001, debate on universal jurisdiction and the *aut dedere* principle had been revived in the Netherlands. With the implementation of the Rome Statute in the Netherlands legal order and codification of the relevant international crimes, the Parliament had given the public prosecutor's office the means to deal with complex criminal cases resulting from *aut dedere aut judicare* treaty obligations. That had led to the prosecution of a number of individuals under universal jurisdiction; the cases were summarized in the annex to his written statement.

41. With regard to the fragmentation of international law, he agreed that it was the result of uncoordinated expansion; from being a tool for regulating formal diplomacy it had become an instrument for dealing with a huge variety of international activities. In some cases, fragmentation could lead to conflicts between different rules and regimes and thereby undermine their implementation.

42. The framework provided by the Vienna Convention on the Law of Treaties did indeed offer the international community with a means of unifying international law. For that reason, it might be advisable for the Commission to study and ultimately recommend guidelines for the application of article 31, paragraph 3 (c), of the Convention. The broad formulation of that subparagraph supplied the interpreter of a treaty with a valuable tool for reconciling conflicting rules. The Commission could also build on the case law of the International Court of Justice, starting with the *Oil Platforms* case.

43. He concurred with the Commission's final recommendation that conflicts between rules of international law should be resolved in accordance with the principle of harmonization. It was axiomatic that fundamental principles of international law such as *pacta sunt servanda*, the precedence of *jus cogens* over all other obligations under international law and the opposability of *erga omnes* obligations to all States would continue to serve as means of combating fragmentation. Those principles could also be strengthened by States through their bilateral and multilateral contacts and also by international courts and tribunals and the writings of international lawyers.

44. **Mr. Wang** Chen (China) said that the draft articles on the effects of armed conflicts on treaties were, as the Special Rapporteur had observed, preliminary in nature and in need of substantiation. Some treaties to which international organizations were parties might be related in some way to armed conflicts. In practice, international organizations had been directly involved in several armed conflicts. The latter were therefore likely to have direct effects on treaties concluded by the organizations in question and on other States parties to those treaties. For that reason, treaties concluded by international organizations should be studied under the topic.

45. Military action taken by a State against internal rebel groups should not come within the purview of the draft articles, but that did not mean that a State could disregard its international and treaty obligations. A State was responsible for implementing treaties at the international level; internal conflicts did not generally have a direct bearing on the effective execution of treaties.

46. The definition of an armed conflict contained in the 1985 resolution of the Institute of International Law reflected the traditional and universal understanding of an armed conflict and should serve as a reference. Although the definition of an armed conflict given by the International Tribunal for the former Yugoslavia in the *Tadić* case had included conflicts among different armed groups within a State, that definition was relevant only to that particular trial and did not appear to be universally accepted as a general rule.

47. The intention of State parties at the time a treaty was concluded was indeed of fundamental importance for that treaty. Nonetheless, since the Charter of the United Nations explicitly prohibited recourse to force in international relations, States parties did not need to contemplate the different impact that peace and war would have on the provisions of a treaty and therefore there was no such thing as the anticipation of armed conflicts in treaty law. Consequently the criterion of intention for determining the effect of armed conflicts on treaties seemed outdated. It would, perhaps, be better to determine whether a treaty would continue to apply during an armed conflict on the basis of the viability of the treaty itself and of a contextual approach encompassing an examination of the object and purpose of the treaty and the nature and extent of the armed conflict.

48. Draft article 3 on *ipso facto* termination or suspension constituted a departure from the traditional view that the outbreak of an armed conflict meant the termination of the operation of a treaty. It clarified and justified practice since the Second World War and safeguarded the viability of the treaty. It should therefore be retained.

49. Draft article 7 contained a useful list of the types of treaties which remained in operation during armed conflicts. The Commission should also study the elements which were common to those treaties in order to provide better guidance for the future. It should likewise examine the relationship between the legality of the use of force and the provisions of the Charter of the United Nations relating to the use of force and self-defence, as well as the various effects of the legal and illegal use of force on treaty relations.

50. The preliminary report of the Special Rapporteur on the obligation to extradite or prosecute (A/CN.4/571 and Corr.1) had helped to clarify the focus of future work on the topic. International security and development were currently facing grave threats from international, transnational and terrorist crimes. The obligation to extradite or prosecute was of immense practical significance for the promotion of international cooperation in combating those crimes effectively and ending impunity. The study of that topic should therefore place greater emphasis on the progressive development of relevant rules designed to foster cooperation in that sphere.

51. The Commission should first analyse treaty provisions and investigate State practice in the fields of treaty implementation, legislation and case law, in order to ascertain whether the obligation to extradite or prosecute was purely a treaty obligation or a general obligation under customary international law. Many recent treaties contained the obligation to extradite or prosecute in respect of certain crimes. Given the universal nature of those treaties, it would seem that in certain areas, such as counter-terrorism, the obligation to extradite or prosecute was gradually being accepted by the whole of the international community. For that reason, it might be useful to study the relationship between the obligation to extradite or prosecute and the principles of sovereignty, human rights protection and universal jurisdiction and the reciprocal effect of those principles on each other.

52. The obligation to extradite or prosecute should apply to serious international and transnational offences, including war crimes, crimes against humanity, genocide, torture and terrorist crimes and, in some cases, crimes under domestic law which caused significant harm to the State and the interests of the people. The traditional arguments marshalled against extradition for the latter crimes had hindered the punishment of offenders. Such impunity would be ended if States were placed under an obligation to extradite or prosecute in respect of those offences and that in turn would help to restore law and order and uphold justice.

53. The report produced by the Study Group on the fragmentation of international law (A/CN.4/L.682 and Corr.1 and Add.1) was of great academic value and its conclusions would serve as a useful source of practical information. They should therefore be studied carefully by Governments, international organizations and jurists.

54. **Mr. Alday** (Mexico) said the obligation to extradite or prosecute was a cornerstone of international criminal law. The General Assembly had made it part of the United Nations counter-terrorism strategy, as a key principle in combating the international crime of terrorism. Its growing usefulness for States was demonstrated by its incorporation into a number of international treaties, such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption. However, the obligation to extradite or prosecute was neither a universal principle nor an established rule of customary law.

55. According to the Special Rapporteur, when studying the question it was also necessary to examine the issue of universal jurisdiction, which applied only to crimes so serious that they affected the international community as a whole. When such crimes were committed, States had both a right and a duty to exercise universal jurisdiction. A State which had arrested a perpetrator of such a crime but was unable to try him with all the attendant guarantees of fair trial, must extradite him to such other State as made a request in proper form, or to an international criminal tribunal.

56. The principle *aut dedere aut judicare* was also codified in a number of treaties, showing that it applied to crimes other than those covered by universal jurisdiction. It was important to preserve the distinction between the principle itself and the exercise of universal jurisdiction, in order to prevent abuses of the jurisdiction for political or other reasons. He agreed with the Special Rapporteur that "the obligation to extradite or prosecute is constructed in the alternative, giving a State the choice to decide which part of this obligation it is going to fulfil" (A/CN.4/571, para. 49). That placed the exercise of State sovereignty at the heart of the discussion. Effective application of the principle meant enhancing the capacity both of local courts and of international criminal tribunals. Incorporation of the principle into judicial practice, both national and international, would serve to strengthen the role of the International Criminal Court. However, the proper application of the principle would not be achieved through codification alone. It also depended on the will of States, which had to combat impunity through the criminal law It was they who had to strike a balance between their national systems of criminal justice and the international order.

57. **Mr. Al-Adhami** (Iraq), referring to chapter X (Effects of armed conflicts on treaties), agreed that it would be wise for the Special Rapporteur to examine the effects of armed conflicts on treaties concluded by international organizations. He also considered it necessary to study the effects of armed conflicts on treaties which had not yet entered into force, or which had not yet been ratified by the parties to the conflict, in order to preclude differences of opinion on the matter with regard to draft article 2 (b), since internal armed conflicts could result in the non-application of some treaties, they ought to be dealt with in the text as well.

58. Concerning draft article 4, the intention of the parties was a crucial factor in determining the susceptibility of a treaty to termination or suspension when the treaty itself contained no provisions on the matter and when the *travaux préparatoires*, the context in which the treaty had been concluded and the nature of the treaty shed no light on the subject.

59. He welcomed the Special Rapporteur's readiness to revisit draft article 7, which his Government had some difficulty in accepting.

60. **Mr. Sandoval Bernal** (Colombia), commenting on chapter X (Effects of armed conflicts on treaties), said that any consideration or development of the law of treaties must pay due heed to the guiding principle *pacta sunt servanda* as a *jus cogens* norm binding on

all members of the international community. The fulfilment of treaty obligations was, in turn, governed by the principle of good faith set forth in Article 2, paragraph 2, of the Charter of the United Nations.

61. Compliance with treaties and their execution in good faith guaranteed international peace and security. Any loopholes which would end the validity of international agreements in a manner inconsistent with international law would jeopardize harmony between nations and give rise to endless disputes.

62. The Vienna Convention on the Law of Treaties should constitute the legal benchmark of any work related to the law of treaties. It was therefore essential to avoid any reinterpretation or development of its provisions which might alter their spirit and content. The International Court of Justice had consistently held that most of the Convention's articles set forth customary law, something which enhanced its legal value.

63. The rules on the termination and suspension of treaties laid down in that instrument were precise and rigorous and that was a further reason to proceed with care when considering the possible effects of armed conflicts on treaties. All treaties should be complied with in full by the parties to them, for whom they were the law. The validity and inherent inviolability of some treaties due to their subject matter could not be undermined for any reason whatsoever. Article 62, paragraph 2 (a), of the 1969 Vienna Convention and article 11 of the 1978 Vienna Convention on Succession of States in respect of Treaties both provided that no fundamental change in circumstances might be invoked as a ground for terminating or withdrawing from a treaty establishing a boundary. Hence any examination by the Commission of the effects of armed conflicts on treaties should rest on the assumption that armed conflicts could not serve as a pretext for non-compliance.

64. The definition of a treaty should be that contained in article 2 (a) of the 1969 Vienna Convention and should therefore be confined to treaties already in force and governed by international law. To avoid unnecessary repetition, the draft article in question needed merely to contain a reference to that definition rather than repeating it in full. The definition of an armed conflict in draft article 2 (b) was indeed tautological. In order to obviate the risk of an imprecise or inadequate definition, the draft article should simply refer to the 1949 Geneva Conventions. There was no point in incorporating a definition of internal armed conflicts, because they did not affect relations between States and should not therefore give rise to the termination or suspension of existing treaties, unless otherwise provided in the treaty in question. Nor should military occupation be included.

65. The text of draft article 3 ought to be retained as it stood for the sake of contract certainty, except that its title should be changed to "Validity of treaties". Draft article 4 rested on the premise that, when States entered into treaties, they were in the habit of considering the possibility of the outbreak of armed conflicts after the entry into force of those instruments, whereas in fact treaties were concluded in order to strengthen relations between States, promote cooperation and avoid disputes or conflicts. For that reason, it was inadvisable to retain a draft article predicated on the intention of the parties to suspend or terminate the application of treaties in the event of an armed conflict.

66. Draft article 5 was unnecessary and would lead to misunderstandings. If treaties in general were not suspended or terminated by armed conflicts, that was all the more true of treaties expressly covering such situations. Draft article 5 would be thoroughly redundant if draft article 4 were kept. The will of the parties was clearly expressed by the existence of such treaties and no such clause was therefore needed. Moreover the outbreak of an armed conflict clearly did not prevent the parties from concluding legal agreements on the suspension or waiver of a treaty concerned with such situations. Hence paragraph 2 of the draft article served no useful purpose. Legally speaking, armed conflicts never weakened or abolished the sovereign right of a State to conclude treaties.

67. Draft article 6 was also unnecessary and should be deleted. Although an article along the lines of draft article 7 was appropriate, it should not contain an arbitrary list of treaties which might create an *a contrario* presumption that treaties not included would automatically lapse in an armed conflict. Instead draft article 7 ought to set forth the guiding principles for determining exactly which treaties, by virtue of their nature or purpose, would never be affected by an armed conflict. In drawing up such a provision, one guiding principle should be the inviolability of certain treaties on account of their subject matter. If a list of treaties applying even during an armed conflict was retained after all, it must include treaties establishing borders.

68. **Mr. Kuzmin** (Russian Federation), commenting on the draft articles on responsibility of international organizations, expressed agreement in principle with draft article 28. States should not be able to evade their responsibility by hiding behind the "veil" of an international organization. The text should, however, be redrafted to draw a clear distinction between a situation in which providing an organization with competence in a certain field was itself a breach of international law, and one in which the competence was lawful but the use made of it was not. Draft article 29 made it clear that the responsibility of an international organization for internationally wrongful acts derived from its status as a subject of international law. Its effect was to limit the instances in which a State could be responsible for the acts of such an organization. However, it was conceivable that an international organization would not always be in a position to compensate a victim of its internationally wrongful acts. He therefore preferred the wording of subparagraph (a) of draft article 29, paragraph 1, to that of subparagraph (b). A State which had acted to endow an international organization with legal personality must also give it the means to fulfil its functions, including those which had led it to incur responsibility towards a third party. It should also be evident that States and international organizations were bound to cooperate to terminate unlawful acts by an international organization, just as if it were a State.

69. Turning to the draft articles on the law of transboundary aquifers, which could become a draft convention, he welcomed the provision in draft article 3 on the sovereignty of aquifer States over portions of a transboundary aquifer within their territory. It would be useful to make it clear, in that draft article, that the sovereignty of the aquifer State was also governed by the rules and generally accepted principles of international law. Draft article 14 should make it clear that a legal regime for activities covered by the draft articles could only be established with the consent of the aquifer State. The question whether the topic "Shared natural resources" should include the problems relating to oil and gas needed further consideration. He saw no current need for universal rules on the latter subject.

70. He welcomed the Guiding Principles on unilateral declarations of States, and was glad to note that the Commission had confined itself to principles governing declarations intended by their author States to give rise to obligations under international law. He agreed with the statement in the preamble to the Guiding Principles that States could even be bound by their silence. Unilateral acts of that sort were not, of course, open to codification. In drafting the Guiding Principles, the Commission had taken the correct approach by identifying the specific characteristics of unilateral acts, rather than slavishly copying the pattern of the Vienna Convention on the Law of Treaties. The text of the Guiding Principles was, he believed, ripe for submission to the General Assembly.

71. He welcomed the Commission's work on the fragmentation of international law, and especially the emphasis placed on the systemic nature of international law, the interrelationship of the different categories of norms and the optimal methods of interpreting and applying international law. The concepts of *jus cogens* and obligations *erga omnes* were vital to preserving the integrity of international law. He welcomed the statement on the principle of harmonization, contained in paragraph (42) of the Study Group's conclusions. In the light of that principle, the "danger" of fragmentation became hypothetical. The Commission's draft on the topic would eventually become a valuable tool in the daily work of ministries of foreign affairs, and could now be submitted by the General Assembly to the scrutiny of States.

72. He endorsed the draft guidelines adopted by the Commission on reservations to treaties. The draft clarified issues not covered in the Vienna Conventions: which kinds of reservations were permissible, and which were prohibited by the terms of the treaty and which were not. He had some concern, however, about draft guideline 2.1.8, on procedure in case of manifestly invalid reservations. That draft article contradicted the notion in the Vienna Convention on the Law of Treaties of the strictly technical function of the depositary. He did not object to giving the depositary power to judge that a reservation was manifestly invalid, but the powers of the depositary did not go any further. The commentary should make it clear that it was not the intention of the draft guideline to extend them unduly. It should also include a definition of "manifest invalidity".

73. With regard to the Commission's preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, he urged a cautious approach to the question whether treaty-monitoring bodies had authority to rule on the validity

of reservations. Identifying the object and purpose of a treaty was not the same thing as interpreting its provisions. A distinction should be drawn between the power to decide that a reservation was manifestly invalid, and the power to assess its validity in the light of the treaty's object and purpose. The two kinds of assessment could have different legal consequences, and it would be better to state simply that monitoring bodies could make recommendations as to the validity of a reservation. The preliminary conclusions were silent on whether and how monitoring bodies should take account of the earlier views of States concerning reservations. Moreover, it was not clear what should be done if the monitoring body and the States parties to the treaty took a different view on the validity of a reservation. That should be given careful consideration when the Commission came to deal with the consequences of invalid reservations.

74. Turning lastly to the effects of armed conflicts on treaties, he endorsed the central proposition, in draft article 3, that the outbreak of an armed conflict did not ipso facto terminate or suspend the operation of treaties. However, the principle of automatic termination would, as before, apply to certain categories of treaties, especially treaties of friendship and cooperation. That was why the phrase "ipso facto" was to be replaced by "necessarily". Draft article 3 should also distinguish between the effects of armed conflict for treaty parties both of which were parties to the conflict, and as between parties to the conflict and third parties. The draft articles should also spell out the effects of armed conflicts on treaties with international organizations, and the consequences for treaties which had been signed but were not yet in force and for treaties temporarily in force. The draft articles should not cover internal armed conflicts, which were already governed by the general rules of the Vienna Convention on the Law of Treaties concerning circumstances in which a treaty could be terminated. He was dubious about the term "intention of the parties" as a criterion for determining the consequences of an armed conflict. That was a subjective criterion, subsidiary to other more important ones such as the character of the armed conflict, the parties to the conflict, the scope for implementing the treaty during an armed conflict, and the object and purpose of the treaty.

75. *Mr. Barriga (Liechtenstein), Vice-Chairman, took the Chair.*

76. **Mr. Serradas Tavares** (Portugal), commenting on the draft articles on the effects of armed conflicts on treaties, said certain core issues needed further work. For instance, the proposed definition of "armed conflict" should take account of more up-to-date concepts, such as those found in the report of the High-Level Panel on Threats, Challenges and Change. A broader definition would be more satisfactory, leaving it to be determined on a case-by-case basis which kinds of hostilities might have effects on particular treaties. He did not favour including internal conflicts within the scope of application of the draft articles. Internal conflicts did not directly affect the treaty relationships between States parties to a treaty, and should be dealt with in the framework of the Vienna Convention on the Law of Treaties. The draft articles should be confined to situations where relations between States parties were seriously destabilized. He shared the Commission's view that an aggressor State should not be placed in the same position as a State exercising its right of self-defence.

77. His delegation continued to doubt the advisability of placing in draft article 3 the general rule of continuity, which was itself the core of the topic. Since neither State practice nor treaty practice offered sufficient guidance, it would be best not to formulate any general rule at all. Moreover, the references to "the intention of the parties" in draft article 4 introduced a rather subjective criterion, because that intention could not readily be determined. It was unrealistic to believe that treaty parties, when negotiating a treaty, foresaw the effects an armed conflict would have on it. It would be best to choose more objective criteria, such as the object and purpose of the treaty, the norms of the treaty, or the legality of the actions of each party to the conflict.

78. Draft article 7 had the merit of ensuring that norms of humanitarian law, human rights or *jus cogens* would be brought into play. While approving the chosen method of categorizing treaties, his delegation was open to other solutions which would achieve the same result.

79. Turning to chapter XI on the obligation to extradite or prosecute, he expressed general agreement with the Commission's proposals for its continuing work on the topic, and with its cautious approach to the scope of the topic. He emphasised the importance of clarifying and harmonizing procedures for complying with the obligation, and of encouraging close

cooperation among States. Portugal, as a party to a number of bilateral, regional and universal treaties on extradition or prosecution, was working for closer cooperation with other States to prevent the creation of safe havens. It had, however, entered certain reservations to those treaties in line with its own constitution, which prohibited extradition on political grounds or for crimes which would attract unduly severe penalties in the requesting State. Portuguese citizens could only be extradited in cases of terrorism and international organized crime, and where conditions of reciprocity had been established by treaty and a fair trial was guaranteed by the law of the requesting State. The political crimes for which extradition was not permitted specifically excluded crimes recognized under customary international law, such as genocide, crimes against humanity and war crimes.

80. Commenting on the work of the Study Group on the fragmentation of international law (chapter XII), he concurred with the view that there was no homogeneous system of international law. However, international law was a true "system" with rules capable of solving the problems of contradictory legal regimes and judicial decisions. The contribution of the Commission was to alert States to the issue. The draft conclusions, being straightforward, neutral and well founded in case law, were useful tools for States facing particular problems in the interpretation or application of norms. He particularly welcomed conclusions (31) to (42) on the issue of hierarchy in international law, *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations. He hoped the General Assembly would take note of the conclusions and refer them to the attention of States.

81. **Mr. Fitschen** (Germany), commenting on the topic on fragmentation of international law, welcomed the conclusions of the Study Group's work. He pointed out that although the relationship between two or more treaties covering related issues was sometimes far from clear, causing difficulties in their interpretation, diplomats representing States during negotiations on the drafting of a treaty were well aware of the possible overlap of subject matter and therefore avoided regulating matters which could result in unravelling or reopening an existing text. Safeguard clauses in treaties were clear evidence of the negotiators' dilemma and of their decision, in such cases, to postpone the question of how to harmonize one treaty with another to the application stage. States themselves had ultimately to effect the harmonious application of the various treaties to which they were parties. The assumption should always be that States intended to conclude treaties that could and should be interpreted in an integrated manner. That was also true at the national level, when treaties were being incorporated into domestic law and the corresponding provisions of domestic law had to be reconciled. The question also arose of how to interpret the tools for interpretation contained in the Vienna Convention on the Law of Treaties, in a world of multiple "conflicts" of international law and where the meaning of treaties was influenced by subsequent practice, including statements by Governments, international organizations and other actors. It was precisely in that field that the merit of the Commission's work lay: a number of important ideas were included in the conclusions and would serve the purpose the Commission had intended.

82. It would be helpful for negotiators of future treaties, when addressing issues of conflict of international laws, to have at hand some practical tools of treaty interpretation. Difficult as it might seem for the Commission to deliver another outcome suitable for that purpose, his delegation was open to any practical proposal in that connection. He particularly wished to suggest, for consideration by the Commission, the question: "Adapting international treaties to changing circumstances: What constitutes subsequent agreement and subsequent practice, and in which way do they affect the implementation and interpretation of treaties?".

83. **Mr. Lindenmann** (Switzerland) welcomed the conclusions of the Study Group on the fragmentation of international law. He understood the decision, for reasons of space, not to reproduce the study itself in the Commission's report. That was nevertheless regrettable, given the practical usefulness of the study, and he hoped it would be published in other forms and widely disseminated.

84. **Mr. Hmoud** (Jordan) commended the Commission's efforts to develop draft articles on the important topic "Effects of armed conflicts on treaties", which was part of the law of treaties and should be kept separate from the law on the use of force. Unless derogation from treaty obligations was dealt with independently of the question of the lawfulness of the use of force, different sets of rules and different legal consequences would result. The

premise should be that war was an exceptional circumstance vis-à-vis treaty application and that its effect on such application should be minimal.

85. With regard to draft article 1, his delegation considered that the scope of application should extend to treaties to which international organizations were parties. The treaty rights and obligations of international organizations frequently had substantial effects on international relations and the international economy. To exclude them would create a legal gap in situations where States and international organizations were parties to the same treaty, especially where the treaty obligations were interrelated.

86. In draft article 2, he would prefer a simpler definition of "armed conflict", avoiding issues that should properly be addressed elsewhere. The Commission should, however, define what was meant by "treaties" for the purpose of the draft articles, looking to definitions in other international instruments and other branches of international law.

87. He would prefer to retain draft article 3, to make clear that the general rule was that the treaty obligations should apply in all situations and that exceptional circumstances should have the least possible effect. In referring to termination, the term "ipso facto" was a better choice than "necessarily".

88. In draft article 4, his delegation recognized the importance of "intention", which might be a primary factor in determining the susceptibility of treaties to termination or suspension during armed conflict. However, since evidence of intention might be problematic where the treaty contained no provision concerning the effect of war, relying solely on the test of intention would have two effects. First, the treaty would be presumed to continue to apply fully during an armed conflict. Second, a party to the treaty engaged in armed conflict would have no option of suspending or terminating the treaty even if obliged to do so, and would have to derogate from the treaty, thus committing a wrongful act. It was true that the party concerned could rely on the rules on international responsibility to preclude wrongfulness, but that seemed to be unnecessarily complicated. Moreover, there seemed to be no reason why susceptibility to termination or suspension on the basis of intention should be dealt with, in draft article 4, while leaving other possible grounds for derogating from a treaty during armed conflict to other branches of international law. He was therefore in favour of exploring other possible factors affecting susceptibility to termination or suspension, such as the nature of the obligation derogated from and the extent and nature of the armed conflict. The latter factor was independent and not related to the "intention" factor as was the case according to draft article 4.

89. Concerning draft article 7, his delegation agreed that the object and purpose of some treaties negated the possibility of suspension or termination in the event of armed conflict. However, only those categories of treaties which were well known to have that effect should be included in the scope of the draft article. If the categorization exercise proved to be too problematic, the final commentary to the draft articles could mention certain such categories of treaties by way of illustration.

The meeting rose at 1.05 p.m.